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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. ARMANDO SUAZO OCHOA, Defendant and Appellant.	H039529 (Santa Clara County Super. Ct. No. CC818740)

While driving under the influence of alcohol, defendant Armando Suazo Ochoa struck three pedestrians, killing two and injuring the third. At trial, the prosecutor proceeded on two theories of malice aforethought, express malice and implied malice, with respect to the two murder charges. Defendant, who testified on his own behalf, relied on a defense of unconsciousness based on his arachnoid cyst. Following trial, the jury found him guilty of two counts of second degree murder (Pen. Code, §§ 187-189)[1] and one count of aggravated assault (former § 245, subd. (a)(1)). The jury also found true the special allegations attached to those offenses.

On appeal, defendant asserts that the trial court unconstitutionally refused to instruct on involuntary manslaughter as a lesser included offense of murder, the court's instruction on unconsciousness misstated the law and contained an unconstitutional presumption, and its instruction on voluntary intoxication violated due process because evidence of intoxication was relevant and exculpatory with respect to implied malice

[1] All further statutory references are to the Penal Code unless otherwise indicated.

murder. He also raises related ineffective assistance claims and contends cumulative error denied him due process and a fair jury trial. Lastly, defendant claims the trial court erred in imposing a five-year sentence enhancement pursuant to section 12022.7, subdivision (c).

We find no error and affirm.

I

Procedural History

Defendant was charged by first amended information filed November 15, 2012, with two counts of murder (§ 187) (counts 1 & 2), one count of attempted murder (§§ 187, 664, subd. (a)) (count 3), and one count of assault with a deadly weapon or by means of force likely to produce great bodily injury (former § 245, subd. (a)(1)) (count 4). The charges and associated special allegations were tried by a jury. The trial court declined to give an involuntary manslaughter instruction offered by the defense.

The jury found defendant guilty of murder as charged in counts 1 and 2 and found true that, in the commission of those offenses, he personally used a deadly and dangerous weapon, an automobile, within the meaning of section 12022, subd. (b)(1). The jury also found defendant guilty of assault in violation of former section 245, subdivision (a)(1), and found true that he personally inflicted great bodily injury on a person not an accomplice who was 70 years of age or older within the meaning of section 12022.7, subdivision (c), and section 1203, subdivision (e)(3). The jury deadlocked on the attempted murder charged in count 3 and the court declared a mistrial as to that count.

II

Evidence

A. *Prosecution's Case*

Background

In September 2008, Eric Ochoa, lived at 1421 Hillsdale with defendant, his father, his mother Deborah, and his two sons.[2]

Defendant was an alcoholic and he drank a lot of alcohol, mostly beer. Eric acknowledged that defendant was sometimes a happy drunk and sometimes he was an ornery drunk. Eric had seen him challenge people to fights. It was "not uncommon" for defendant to get into bickering matches.

In about September 2007, defendant had told Eric that he had been jumped and beaten at Hillview Park. Deborah had taken defendant to the hospital.

In September 2008, defendant had been laid off from work for at least six months.

The Early Morning of September 14, 2008

Eric was aware that defendant had been drinking alcohol at home during the day and night of September 13, 2008 and the early morning hours of September 14, 2008. At about 5:55 a.m. on September 14, 2014, Eric received a telephone call from his mother, who had left to pick up his grandmother. She suggested that Eric retrieve his youngest son, who was then about four years old and sleeping in defendant's bed, because defendant was "too intoxicated to actually keep an eye on [Eric's son] if he woke up in the morning."

When Eric tried to take his youngest son from his parents' bed, defendant became upset and belligerent. Defendant was cussing and yelling; he was slurring his words and not making sense. Eric had to grab his son from defendant, who was holding him in his

[2] We will refer to Eric Ochoa and Deborah Ochoa by their first names for the sake of clarity since each of them share a surname with defendant.

arms, and put his son in a safe place. Eric tried to explain to defendant that he could not leave his son with defendant for the morning because defendant was too drunk. Defendant angrily punched the wall in the hallway and cut his hand. Defendant challenged Eric to a fight. Defendant swayed as he walked; his eyes were very glossy and very red. Defendant was obviously drunk. Eric and defendant argued loudly for about 20 to 30 minutes.

Eric was on the phone with his mother while he was arguing with defendant. Eric asked his mother to return home because the altercation was getting out of hand and she came back.

At 6:16 a.m. on September 14, 2008, Jack Anders, who lived on the street immediately north and diagonally to the rear of defendant's house, called 911 because his wife and he were awakened by the commotion at defendant's house. He heard a lot of screaming and heard loud banging on walls. While he was still on the 911 call, Anders heard the sirens of arriving police.

Heather Randol, a San Jose police sergeant, was called to 1421 Hillsdale Avenue at approximately 6:16 a.m. on September 14, 2008 regarding a family disturbance. She arrived at about 6:20 a.m. Other officers, who had handcuffed defendant and Eric, brought them out to the front porch, where Sergeant Randol made contact with them. At some point, Eric's mother, Deborah, took Eric's son with her and left. After determining that there had been no physical altercation between defendant and his son, the police released them. The responding officers cleared the scene between 6:30 a.m. and 6:41 a.m.

Eric went back to bed. At some point, Eric, who was half asleep, heard a door slam and heard a car leaving. Defendant owned a white Suburban.

When Anders took his dogs out for a walk at Paul Moore Park across from defendant's house, between a half an hour and an hour and a half after making the 911 call, Anders noticed a large, white SUV pull away from 1421 Hillsdale and travel at

"very, very high speeds." The screeching tires and revving engine caught his attention. Anders saw the vehicle drive around the park and heard the tires screeching around each turn. The vehicle turned right or south onto Cherry without stopping at the stop sign. Cherry dead ends into Almaden Expressway and an ARCO station is on the corner.

At close to 8:00 a.m. on Sunday, September 14, 2008, Christina Alvarez Rodriguez arrived at her son's San Jose restaurant, El Grullo, near Tully Road and Alvin, where she then worked. Defendant had ordered chicken soup and beer to go and he was yelling. He was difficult to understand because he was "really drunk." Rodriguez told defendant not to speak so loudly. She offered him a cup of coffee and she told him that he should not drink and drive. Defendant yelled at her that she was like his mother and she was getting on his case.

When his food was ready, defendant angrily left the restaurant, yelling profanity. Defendant left the beer behind and threw down his food in the parking lot. Rodriguez saw him enter a white van, which was parked next to the front door of the restaurant. Defendant backed up and left very fast, burning tire. He turned from the parking lot onto Alvin, catching the curb, in the direction of Tully.

The September 14, 2008 Incident

On the morning of Sunday, September 14, 2008, Candido Herrera, who played soccer at Hillview Park, was driving to the park in a "Chevy" Tahoe. Hillview Park is bounded by Ocala Avenue, Berona Way, Alfred Way, and Adrian Way.

On Tully Road, at the intersection of King Road, Herrera stopped in the left-hand-turn lane closest to the center of the road. A male driving a white "Chevy" Suburban pulled up on his right in the number two left-hand-turn lane. Very loud Spanish music was emanating from the Suburban's window, which was open. The driver of the Suburban looked at Herrera and made a palms up, "What's up," hand gesture, which Herrera returned. At trial, Herrera identified defendant as the driver of the white Suburban.

When the light turned green, defendant turned left first and moved into the most center lane. Herrera turned left onto King Road and began driving behind the Suburban. The Suburban was going back and forth between two lanes. Herrera stayed behind the Suburban to avoid being struck from the side. Defendant drove at various speeds and suddenly slowed way down, forcing Herrera to brake hard to avoid an accident. The Suburban continued to weave between lanes and then suddenly braked again, which required Herrera to brake again to avoid rear-ending the Suburban. Herrera thought that something was wrong with defendant since he was braking for no reason.

Defendant and Herrera both turned right at Ocala Avenue. At a red light, their vehicles were stopped side by side; Herrera was in the proper lane and defendant's Suburban was on the shoulder in the bike lane. Herrera lowered his passenger window and asked in a "somewhat loud" voice in Spanish why defendant was driving like that because he was liable to cause an accident. Defendant responded in a loud, angry voice, "You son of a bitch." Herrera, who was familiar with intoxicated behavior because his own father was a drunkard, believed that defendant was drunk.

When the light turned green, defendant took off quickly and drove ahead of Herrera. Herrera, who was following at a distance behind, saw the Suburban pass four or five cars using the center lane between the yellow lines. A number of cars coming from the opposite direction had to get out of the Suburban's way.

When Herrera reached Hillview Park, he turned left from Ocala Avenue onto Adrian Way to get away from the Suburban, and then turned right onto Alfred Way, which was where Herrera planned to park. The Suburban turned left from Ocala onto Berona Way and then drove around the park from the opposite direction taken by Herrera and, on Alfred Way, defendant drove the Suburban into Herrera's lane and directly at Herrera's vehicle. Herrera swerved to the right to avoid a collision. It was about 8:15 a.m. and there were no other cars around. Herrera kept driving and went into the residential area and parked his vehicle in a cul-de-sac.

On September 14, 2008, Mario Moran was painting the soccer field and setting up the nets at Hillview Park. He arrived around 8:05 a.m. While Moran was setting up a goalpost on the field, he heard loud music coming from a vehicle and he saw a white Suburban with its window down driving erratically on Ocala Avenue, braking hard and speeding up two or three times. Moran heard the Suburban's tires squeal as it braked on Ocala Avenue. It turned left onto Berona Way and again stopped and started. The Suburban turned left onto Alfred Way and Moran lost sight of the vehicle for a minute or so. After seeing the Suburban circle the park, Moran saw the Suburban enter its parking lot from the Adrian Way entrance and park.

On Sunday, September 14, 2008, Abraham Sanchez was supposed to play a soccer game at 9:00 a.m. at Hillview Park. Sanchez walked to the park, arriving there at about 8:25 a.m. Sanchez joined his friend Jorge and other soccer players who were gathering at the parking lot. Sanchez noticed defendant drive a white Suburban into the parking lot because he "came in really fast" and the music was playing "full blast."

Defendant got out of the vehicle; the loud music was still playing. He approached an SUV on the driver's side and briefly talked to someone sitting in the vehicle. Defendant went up to a group of soccer players.

Defendant, who appeared to be under the influence of alcohol, approached Jorge. Defendant wanted to fight and began to use foul language. Sanchez told defendant to sit down and watch the game. Defendant asked, "Are you threatening me?" Sanchez told defendant that he was not threatening him; Sanchez told defendant that they came to play. Sanchez offered his hand for a handshake and defendant shook his hand. Jorge also told defendant that they did not want to fight and to calm down, but defendant insisted that he wanted to fight.

After about 15 minutes in the cul-de-sac, when Herrera thought the Suburban driver would be gone, Herrera returned to Hillview Park and entered the parking lot. His soccer game was scheduled to start at 9:00 a.m. The first thing Herrera saw was

defendant arguing with others. Herrera parked his car, walked toward defendant, and scolded defendant in Spanish about his driving. Defendant ignored Herrera and continued arguing with the others.

Defendant was speaking loudly and insulting them in Spanish, calling them names like "assholes" or "dumb asses" and "you fucking Mexicans." Defendant appeared to be intoxicated; he exuded the odor of alcohol and his eyes were "somewhat glassy" or shiny.

Jorge became very angry with defendant when defendant lifted his fist to try to hit Jorge and used the word "motherfucker." Jorge pushed defendant. Another one of Herrera's friends, Pablo, separated them.

Defendant looked like he wanted to fight and was angry.
Defendant took off his blue sandals and moved his arms like he was ready to fight.

Moran headed from the field to his parked car to get some flags. As he got closer, Moran saw defendant acting aggressive and using foul language and challenging soccer players to fight in Spanish. Within the previous year, Moran had seen defendant at the park two or three times but Moran had never spoken with him. Moran saw defendant step out of his sandals while arguing. He did not see the soccer players respond to defendant's challenge to fight.

Defendant was told by Herrera, Jorge, and others to leave or go home. Defendant, who was angry, began walking back to his vehicle. He yelled that he would come back and kill them. After he got in, defendant drove the Suburban forward over a barrier, looped around, and drove directly toward the group, forcing them to move out of the way to avoid being run over. Defendant stopped and yelled "putos."[3]

Defendant circled the parking lot multiple times and then exited the parking lot, making a left onto Ocala Avenue. Defendant drove around the outskirts of the park, driving fast along Ocala, making a fast left turn onto Berona Way, driving fast along

[3] The interpreter said the word means "fuckers" in Spanish.

Berona, and making another fast left turn onto Alfred Way. Sanchez thought defendant was driving about 40 miles per hour. Moran also thought defendant was driving fast along Ocala and Berona but estimated a speed of about 15 or 20 miles per hour.

On the morning of Sunday, September 14, 2008, Esteban Casiano, who was born on November 24, 1934, was walking with two friends, Rudy Escurial and Aproniano Siruno, on the sidewalk bordering Hillview Park on Alfred Way in the direction of Berona Way. Casiano was on the left, closest to the street, and the other two were to his right, one a little bit behind him and one a little bit in front of him.

On Alfred Way, the Suburban moved directly toward those pedestrians and struck them. Herrera, Sanchez, and Moran heard the impact. Three persons flew up into the air and fell into the grass. The Suburban traveled along the sidewalk for some distance and then back onto the street, it accelerated and sped away on Alfred, Herrera estimated a speed of 45 miles per hour, and it turned right onto Adrian Way without stopping.

One victim in the grass was not moving at all. A second man was lying face down in the grass and in pain. His head was bleeding and his legs were bent at odd angles and appeared to be broken. The third victim appeared to be "in a lot better shape."

At trial Casiano remembered seeing a white vehicle "moving so fast" and suddenly they were thrown. It happened "very, very quickly." His next memory was in the hospital.

The Emergency Response

Hau Ngo, a San Jose police officer, was on duty on September 14, 2008. At about 8:47 a.m. that day, Officer Ngo was dispatched to Hillview Park in response to a call of a hit and run involving a fatality. He arrived on the scene a couple of minutes later; he saw a gathering crowd of people and bodies lying in the grass. Officer Ngo maintained security while Officer Dave Solis evaluated the condition of the injured. Emergency personnel arrived within approximately a couple of minutes.

Herrera approached Officer Ngo and the officer spoke with him and took his statement. Herrera provided a description of a vehicle and driver and a BOL ("be on the lookout") broadcast went out.

Officer Solis arrived at Hillview Park at approximately 8:46 a.m. on Sunday, September 14, 2008 and parked on Alfred Way. He saw three males on the ground. The officer checked for the pulse of the man who was not moving at all, Siruno, and found none.

Officer Solis moved to the next victim, Escurial, who was face down. His body was contorted and his leg was bent back over his head in a completely unnatural position. He was making noises and sounds and was still alive at that point. Officer Solis did not touch him.

By this time, fire department paramedics and ambulance services had arrived. Paramedics pronounced Siruno dead at the scene.

Marco Conde, a firefighter and paramedic with the San Jose Fire Department, was called to Hillview Park in San Jose on September 14, 2008 and arrived there at 8:50 a.m. He tended to an injured elderly male identified as Escurial. Escurial was unconscious and moaning. Escurial had "a potential pelvis fracture and multiple leg extremity fractures." Conde placed a collar on Escurial's neck to physically stabilize him and put him on a backboard. Conde was concerned about Escurial's breathing and airway and gave him oxygen.

Escurial and Casiano were transported to San Jose Regional Medical Center.

The Investigation

Christopher Warren, a San Jose police officer and crime scene investigator, arrived at Hillview Park at about 9:50 a.m. on September 14, 2008. He received information that a vehicle traveling westbound on Alfred Way had gone up on the curb, hit three pedestrians, and then gone back onto Alfred. According to Officer Warren, after

Siruno was pronounced dead at the scene, his body was not moved from its location. Officer Warren took certain measurements.

Michael O'Brien, a San Jose police officer, arrived at Hillview Park at about 11:00 a.m. on September 14, 2008. He was "tasked with taking photographs of the scene, documenting [and] marking evidence at the scene, and creating factual diagrams of the scene." He was particularly interested in the physical evidence showing the path of the vehicle and the location of the impact between the vehicle and the pedestrians and the physical evidence that would help calculate the "throw distance" of the pedestrians and the vehicle's speed at the time of impact.

Photographs taken of the scene show tire marks on the curb and sidewalk and tire depressions on the grass. They also show a debris field, which included personal items, two pieces of a broken wooden signpost and sign, and other debris from the collision. The sign[4] had been located in the dirt area between water pipes enclosed by a metal cage and the sidewalk.

At some point, Officer Ngo, who had gone to the southwest corner of the park to investigate and provide scene security, received a call from Officer Solis, who told him to look for and collect a pair of blue sandals. Officer Ngo found blue Croc sandals in close proximity in the parking lot and later that day turned them over to Officer Warren.

Defendant's Conduct Following the Collision and His Arrest

On September 14, 2008, Jorge Castillo, a security officer, was working at the Tamien Station located at Alma and Lelong Street.[5] At about 9:00 a.m. on September 14, 2008, while patrolling the parking lot on Lelong Street, Castillo noticed a white SUV

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[4] The sign read: "WARNING[,] ALCOHOL PROHIBITED[,] POSSESSION OR CONSUMPTION OF INTOXICATING BEVERAGES IS STRICTLY PROHIBITED IN THIS PARK. . . ."

[5] It appears that Jorge Castillo is not the same Jorge with whom defendant interacted at Hillview Park.

with a dark hood and a damaged rear tire on the driver's side and defendant, who was barefoot, talking to some people.

After the people left, defendant asked Castillo to give him a ride home and Castillo said he could not because he was working. Defendant borrowed Castillo's cell phone and tried to make a call with it. Defendant kept asking Castillo to give him a ride, offered Castillo money for a ride, and called Castillo a "puta" when Castillo refused. The odor of defendant's breath led Castillo to believe that defendant was under the influence. Castillo finally called a taxi for him.

At about 9:00 a.m. on Sunday, September 14, 2014, Tesfaye Birru, a taxi driver, received a dispatch to the Tamien Station VTA parking lot on Lelong Street. A security guard waived him down as he arrived. Birru asked defendant to sit in the back but defendant insisted on sitting in the front. Defendant told Birru to "[j]ust drive" and said he would show Birru where to go. Birru told defendant that he could not do that and he needed to enter an address into his GPS device. Defendant eventually gave a Hillsdale address.

Defendant's breath smelled bad, like he had been drinking the night before. Defendant seemed drunk and was "talking too much" and he would not stop talking. While Birru was driving, defendant behaved very aggressively. He was using a lot of "F words," "fuck you" and "fucking," and calling Birru a "Nigger" or Negro, and gesturing with his hands. Birru became concerned for his own safety. In the middle of the taxi ride, defendant wanted to pay Birru.

Around the same time, San Jose police officers, who had been dispatched to 1421 Hillsdale, were making contact with Eric and, while they were speaking about the Suburban, a taxi approached the house and slowed but then continued on Hillsdale. Eric indicated that the taxi's passenger could be defendant. At that time, there were three marked police vehicles and fully uniformed officers in front of the house.

As he approached defendant's Hillsdale address, Birru saw uniformed police and police cars around the house. Birru slowed to park the taxi but defendant told Birru to keep driving.

While sitting in his patrol car at the curb, Officer Steve Wilson observed a taxi with a front-seat passenger, which was driving westbound on Hillsdale, slow in front of defendant's house and then continue westbound on Hillsdale. Officer Wilson followed in his patrol car. He heard on his radio that defendant's son thought defendant was in the taxi. Officer Charles Moggia returned to his vehicle and pursued the taxi as well.

The taxi driver made two successive right turns at defendant's direction. Officer Wilson conducted a vehicle stop of the taxi.

Officer Wilson contacted the passenger and asked him to identify himself. Officer Wilson asked defendant to get out of the taxi. The officer noticed that defendant had no shoes. When asked about it, defendant indicated that his shoes were at his house.

Officer Wilson believed that defendant was under the influence of alcohol based on his bloodshot and watery eyes, his slurred speech, and his unsteady gait. Officer Pettis handcuffed defendant and put him in the back of his patrol vehicle.

Officer Moggia interviewed Birru and then, at approximately 9:39 a.m., the officer administered a preliminary alcohol screening (PAS) test to defendant by having him blow into a PAS device. The test showed a .28 percent blood alcohol concentration. Moggia noticed defendant was barefoot.

Officer Wilson took custody of defendant and told defendant that he was under arrest for murder. The officer transported defendant in his patrol car to the police department's pre-processing center.

At about 9:39 a.m. on Sunday, September 14, 2008, Brian Chevalier, a San Jose police officer, arrived at the Tamien light-rail station at 1177 Lelong Street at Alma Avenue. He was investigating a report that a vehicle at that station may have been involved in an accident. Officer Chevalier located an unoccupied white Suburban, whose

driver's side rear tire was missing from the rim, which appeared to have sustained damage as the result of being driven on. The Suburban appeared to have some collision damage to the driver's side front, including the "[d]river's side front headlight, blinker, bumper, [and] hood."

At the preprocessing center, defendant was fingerprinted, photographed and placed in a holding cell. At 11:00 a.m. on September 14, 2008, defendant's blood was drawn from defendant's arm by a properly certified and qualified technologist.

Defendant asked to use the restroom. Officer Wilson, who was standing by while defendant used the restroom, entered after hearing a "thumping on the floor." Defendant had taken a black plastic bag from the garbage receptacle on the wall, placed the bag over his head, and sucked the bag into his mouth. Officer Wilson immediately removed the bag from defendant's head. The officer returned defendant to the holding cell and advised the preprocessing sergeant that defendant was a suicide risk. In the holding cell, defendant tried three times to prevent himself from breathing by lying on top of the table to which he was handcuffed and placing his throat area on the metal guard on the end of the table. Each time, defendant was pulled off the table and returned to the chair and defendant said, "Just kill me and choke me here."

San Jose Police Officer Patrick Kirby, one of the officers who had responded to Hillview Park on the morning of September 14, 2008, went to the San Jose Police Department's preprocessing center to assist Officer Wilson. Officer Kirby took photographs of defendant and took defendant's clothing and personal property into custody.

After investigators interviewed defendant, Officer Wilson transported defendant to the jail.

Two receipts were found in defendant's wallet. The first receipt was from the "ARCO am/pm" located at 4995 Almaden Expressway, San Jose, which reflected a date and time of September 14, 2008 at 6:38. It showed the purchase of a 24-ounce Tecate.

The other receipt was a record of a withdrawal transaction from Bank of America, located at "Capitol & Aborn," San Jose, which reflected a date and time of September 14, 2008 at 7:06 a.m. Defendant's wallet also contained his Bank of America ATM card used to make his purchases and make the withdrawal.

The Victims

Dr. Michelle Jorden, an assistant medical examiner and neuropathologist with the Santa Clara County Medical Examiner-Coroner Office, testified as an expert in forensic pathology, neuropathology, and anatomic pathology. An autopsy of Siruno, who was about 71 years old when he died, was performed on Monday, September 15, 2008.

Siruno had suffered a very severe skull fracture and numerous facial abrasions and lacerations that indicated blunt-force trauma to the head. He had a subarachnoid hemorrhage, "bleeding onto the brain," attributable to blunt force trauma. Siruno's spinal cord was severed and he had a fracture through the spinal canal at approximately level T3. His aorta was severed, which caused bleeding out or exsanguination. Siruno suffered multiple pelvis fractures and "acute laceration of the urinary bladder." He had numerous rib fractures and "multiple puncture lacerations into both lungs." There were lacerations of his liver, spleen, and left kidney indicative of blunt force trauma. His body had a number of abrasions and bruises.

Dr. Jorden indicated that there were several possible mechanisms of Siruno's death, including damage to the aorta. The causes of his death were multiple blunt-force injuries due to a vehicle striking him. Based on the transection of the thoracic spinal column and the forensic literature indicating that a speed of 52 miles per hour would cause such an injury and considering the reported range of the vehicle's speed, Dr. Jorden opined that the vehicle was traveling at "the higher end of the range," "40 miles per hour, if not faster."

On September 14, 2008, Dr. Jacob Benford, who worked in the emergency department of the San Jose Regional Medical Center, conducted a clinical assessment of

Escurial, a 68-year-old man, when Escurial came into the trauma unit. Although he was conscious when he first arrived, Escurial quickly went downhill and lost consciousness. Escurial had two femur fractures and massive bleeding in the chest and abdomen. Escurial required emergency surgery.

On September 14, 2008, Dr. Bruce George Wilbur, a trauma surgeon, performed emergency surgery on Escurial's abdomen and chest. Dr. Wilbur found Escurial's abdomen filled with blood and his spleen "quite blown apart from a very forceful blow." Escurial also had fractured ribs and a punctured lung.

Dr. Richard Kline, a trauma surgeon at San Jose Regional Medical Center, became involved in Escurial's care on September 15, 2008. When Dr. Kline saw him, Escurial was still in critical condition and bleeding in the abdomen, which required further surgery to relieve the internal pressure by leaving his abdominal cavity open. Escurial was on a ventilator because he could not breathe for himself. Escurial showed signs of acute renal failure and was placed on dialysis. He developed complications, including pneumonia, congestive heart failure, and ischemic necrosis in his left leg, which resulted in an above-the-knee amputation. After it was determined that Escurial had no higher brain function and would never recover from his injuries, the family gave their consent to allow him to die. Escurial died on October 5, 2008.

An autopsy of Escurial was performed on October 6, 2008, the day after his death. Escurial sustained blunt force trauma as the result of being struck by the vehicle and thrown. He sustained "devastating injuries to the thighs, which resulted in tremendous blood loss and caused him to go into hemorrhagic shock . . . ." He suffered subdural hemorrhage, subarachnoid bleeding onto the brain, brain contusion, and "diffuse axonal injury." The brain injuries were fatal. The causes of death were multiple blunt-force injuries.

On September 14, 2008, Dr. Benford had also seen Casiano. Casiano had five rib fractures on his left side. Casiano was in pain and his left foot, ankle, and leg were

bruised and purple. Casiano was discharged on September 15, 2008 and Dr. Wilbur completed the discharge summary. In addition to rib fractures, Casiano also had a "tiny left apical pneumothorax" that was probably caused when the sharp spicule of a broken rib punctured the lung.

After being sent home from the hospital, Casiano was in a lot of pain and he was not able to get up and walk around for about three months. At trial, Casiano indicated that he was still experiencing some pain.

Neurological Evidence

Dr. Marc Lee, chief of neurosurgery at Santa Clara Valley Medical Center and an assistant professor of neurosurgery at Stanford University, testified as an expert in the field of neurosurgery and diagnosis of brain cysts. He saw defendant in October 2011 at the Santa Clara Valley Medical Center neurosurgical clinic to discuss defendant's prior diagnosis of an arachnoid cyst. A repeat scan had shown that defendant had a "stable congenital arachnoid cyst." In Dr. Lee's opinion, defendant had a left temporal arachnoid cyst and it was not causing any neurological problems. The scan did not show that the cyst was causing pressure on the brain.

Defendant was complaining of headaches to Dr. Lee; Dr. Lee had no record that defendant was complaining of anxiety to him. Moreover, Dr. Lee had not seen any reports that arachnoid cysts biologically cause anxiety. Dr. Lee found it unlikely that defendant's arachnoid cyst was causing his headaches and he concluded that defendant's headaches were unrelated to his arachnoid cyst. Headaches due to the pressure of an arachnoid cyst are constant, not periodic, and date back to childhood. In addition, defendant's medical records did not show that he had a history of seizures or he had ever been diagnosed with a seizure disorder.

Expert Testimony regarding the Collision

Officer Warren testified that defendant's white Suburban with a primer paint hood was processed by the police on the morning of September 17, 2008. The Suburban had

no left rear tire, its left tire rim was deformed and damaged, and it had damage to the left front quarter panel. The left front fender had an apparent bloodstain that was swabbed and sent to the crime lab for DNA analysis. DNA testing of the swab confirmed the presence of blood and Siruno as the source of the DNA.

Kevin Cassidy, a San Jose police officer, testified as an expert in mechanical inspection of vehicles and interpretation of vehicle defects and damage. On two separate days in 2012, Officer Cassidy conducted a mechanical inspection of the Suburban, which had been stored indoors in the San Jose Police Department's locked warehouse.

The Suburban had three areas of damage. The Suburban's left frontal area near the leading edge of the hood and the left front headlight assembly were damaged. That damage was "consistent with a pedestrian impact." The vehicle also had a minor "star fracture" to the right side of the windshield" on the passenger's side "consistent with something like a rock hitting the windshield." The third area of damage was the left rear tire. The tire was almost entirely missing and "the rim itself had damage consistent with having been driven on." Driving on a metal rim would cause the vehicle to pull to the left as it is being driven and cause a lot of noise and a very bumpy ride.

Officer Cassidy found "nothing out of the ordinary" with the Suburban's suspension system that "would have caused the vehicle to not be operating properly on the roadway." Aside from the missing left rear tire, the tires were "in normal operating condition." The officer found "no obvious defects" in the vehicle's brake system or steering system that would have affected its "precollision operation." The fluid levels were adequate. He found nothing mechanically wrong with the vehicle's acceleration system that would have affected its "precollision operation." Officer Cassidy found nothing mechanically wrong with the Suburban that would have caused it to "drive in a serpentine manner back and forth between lanes," "to accelerate or stop unexpectedly or suddenly," or "suddenly veer left or veer right while being driven."

Officer O'Brien was qualified as an expert in the field of vehicle collision reconstruction and interpretation. Officer O'Brien diagrammed the scene, including tire marks, which showed the path of defendant's vehicle from Alfred Way onto the sidewalk, onto the grass, back to the sidewalk, and off the sidewalk onto Alfred Way again. There was a distance of about 78 feet from the first tire mark on the curb where the vehicle went up onto the sidewalk to the first tire mark on the curb where the vehicle exited the sidewalk onto the street. In his opinion, a left rear flattened tire would be consistent with the kind of tire marks left at the scene. He saw no evidence consistent with the brakes being applied.

Officer O'Brien calculated that, at the time of impact, defendant's vehicle was traveling at an average speed of 33.6 miles per hour. That average was derived from the range of speeds, 23.9 miles to 38.6 miles per hour, generated by various formulas. The speed limit on both Berona Way and Alfred Way was 25 miles per hour. The speed limit on Adrian Way was 30 miles per hour and the speed limit on Ocala Avenue was 35 miles per hour.

In Officer O'Brien's opinion, the Suburban struck the pedestrians on the sidewalk before it struck the signpost. The area of impact with the pedestrians was about 14.2 feet from the valve box.[6] Prior to the collision, the sign post was anchored in cement. Officer O'Brien thought that, as defendant's vehicle moved past the valve box, the vehicle was probably half on the grass and half on the sidewalk.

Officer O'Brien concluded that the Suburban's left front struck Siruno. Officer O'Brien determined that the distance from the area of impact to the point of rest of Siruno's body was 63.1 feet. In his opinion, the physical evidence was consistent with an observation that the defendant's vehicle took a left turn from Berona Way onto

[6] The officer was referring to the same structure described earlier as the caged water pipes.

Alfred Way, straightened out in the proper lane, veered left and came across the opposite lane of traffic toward the pedestrians on the sidewalk, hit the pedestrians and sent them flying high into the air, drove along the sidewalk, and then exited the sidewalk onto the street.

The parties stipulated to the following facts. At the time of his arrest, defendant was 170 pounds. The blood drawn at 11:00 a.m. on September 14, 2008 was properly handled and delivered to the Santa Clara County Crime Lab, where a properly certified and qualified crime lab analyst tested the blood sample on September 16, 2008. Defendant's blood sample contained .25 percent blood alcohol level concentration. On October 20, 2008, Ghazaleh Moayer, a properly certified and qualified crime lab analyst, tested defendant's blood sample for the presence of drugs and obtained a positive result for a cocaine metabolite called benzoylecgonine.

Moayer testified as an expert regarding the effects of alcohol and cocaine on the human body and their relationship to driving. Alcohol is a depressant of the central nervous system while cocaine is a stimulant of the central nervous system.

A person who is intoxicated from drinking alcoholic beverages may have mood swings, for example going from calm to belligerent, he may have glassy, red, or watery eyes, and his breath may have the odor of alcohol. The effects and symptoms of alcohol at various alcohol levels are cumulative in that the higher alcohol levels include the effects and symptoms of the lower levels.

At a blood alcohol level of .02 to .05 percent, the effects and symptoms include increased risk taking and decreased inhibition. At a blood alcohol level of .04 to .08 percent, the effects and symptoms include impaired vision, impaired divided attention, impaired judgment, increased reaction time, and loss of fine muscle control and coordination.

At a blood alcohol level of .08 to .20 percent, the effects and symptoms include loss of gross motor control and coordination, staggering, body sway, slurred speech, and

decreased perception and responsiveness. At that blood alcohol level, the effects and symptoms include stupor, inability to walk or stand, and eventually coma and death. Someone in an alcoholic stupor is likely to be confused about where he is and where he is going and have a significantly impaired reaction time.

The significance of the legal limit of .08 percent blood alcohol is that senses critical to driving are impaired at that point, although some people may be too impaired to safely drive even below that legal limit. While a person may develop physiological tolerance from drinking a lot of alcohol, which means he would need to drink more to exhibit the same degree of effects, the person at .08 to .20 or higher would still be too impaired to safely drive. A person who is highly tolerant of alcohol might not be in a stupor or unable to walk even with a blood alcohol level of .20 or higher. Such a person might still be able to engage in conversation, physically drive a vehicle and navigate highways and streets, and arrange for a cab and remember his home address. The presence of cocaine, or benzoylecgonine, would help the person to do those activities.

If an average male weighing 180 pounds consumes five beers in about an hour, his blood alcohol level would be about .08 percent because one beer would have burned off. The average burn-off rate of alcohol in the human body is .02 percent per hour.

Defendant's blood alcohol concentration of .25 percent was more than three times the legal limit. This meant that at 11:00 a.m. on September 14, 2008, when defendant's blood was drawn, defendant had approximately 11 beers in his system. It would be expected that, given the burn-off rate, defendant's blood alcohol level was somewhat higher than .25 percent a couple of hours earlier.

As to the cocaine metabolite found in defendant's blood, it indicated that defendant ingested cocaine within 48 hours prior to his blood draw on September 14, 2008. Cocaine, as a stimulant, may cause talkativeness, aggression, excited behavior, restlessness, and anxiety and contribute toward belligerent behavior and increased risk taking.

Defendant's Prior Convictions and Accidents

The parties stipulated that defendant had been convicted of reckless driving in 1980, eight violations of Vehicle Code section 22350[7] (unsafe speed) (between 2007-1997), and two violations of Vehicle Code section 22349 (exceeding 65 miles per hour) (2007-2005). Defendant also had three convictions of a misdemeanor violation of Vehicle Code section 23152, subdivision (a), driving under the influence of an alcoholic beverage (two in 1987 & one in 1985).

On September 4, 1987, Joseph Rodrigues, then a Redwood City police sergeant, and Gilbert Granado, then a Redwood City police officer, conducted a DUI investigation of defendant at approximately 11:52 p.m. Defendant had failed to negotiate a right-hand turn and crashed into the retaining wall on the northeast corner of an intersection. Unsafe speed was a factor in the collision. Officer Granado noticed that defendant had glassy, watery, bloodshot eyes, difficulty keeping his balance, slurred speech, and "he had a strong odor of an alcoholic beverage." Defendant was unable to perform the field sobriety tests. Defendant was arrested for driving under the influence of an alcoholic beverage.

In 1993, defendant was convicted of a misdemeanor violation of former section 23152, subdivision (b), (driving with an unlawful blood alcohol level) and he admitted two prior DUI convictions. The court placed defendant on probation and ordered him to, among other things, serve six months in county jail, complete a multiple offender program (MOP) (an 18-month treatment and education program), and attend 90 AA meetings. His driver's license privilege was suspended for three years. Proof of MOP completion was filed in May 1995.

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[7] Vehicle Code section 22350 states: "No person shall drive a vehicle upon a highway at a speed greater than is reasonable or prudent having due regard for weather, visibility, the traffic on, and the surface and width of, the highway, and in no event at a speed which endangers the safety of persons or property."

The parties also stipulated that, in 2005, defendant was convicted of a misdemeanor violation of Vehicle Code section 20002, subdivision (a) (hit and run driving causing property damage). Nakia Tinsley was the victim of that hit-and-run incident, which occurred on January 11, 2005.

Tinsley was driving north on 101 in the carpool lane when a truck came up behind and closely followed her vehicle. She signaled her intent to move over to the next lane, but before she could change lanes, the other vehicle swooped around her and hit the right front corner of her car. That vehicle then suddenly veered across four lanes of traffic and got off at Great America Parkway. Tinsley followed.

Defendant made a right turn onto Mission College Boulevard and so did Tinsley. At the first light, defendant made a U-turn against a red light but he could not make it in one move and he had to back up and then go. During that maneuver, Tinsley was able to get most of defendant's license plate. When the light turned green, Tinsley made a U-turn and followed defendant's vehicle. When he made a right onto Great America Parkway and then a left on Tasman, so did she. Tinsley was able to get defendant's entire license plate number. Defendant made a U-turn on Tasman and then turned right into a mobile home area. Tinsley pulled over and called the highway patrol.

Alounnalagh Arounsack, a California Highway Patrol officer, responded and took Tinsley's statement, including her description of the vehicle that hit her and its license plate number. The vehicle was registered to defendant at 1421 Hillsdale Avenue in San Jose. The following morning, Officer Arounsack went to that address, where he saw a vehicle matching Tinsley's description with the reported license plate number.

B. *Defense Case*

According to defendant, he had health problems as a child in Mexico. He fainted about once a week and experienced lots of headaches. Defendant first came to California when he was 14 years old. At the time of trial, defendant was 49 years old.

In about 1979, he married Deborah. Defendant worked a number of different jobs. In 1992, he received legal documents to stay in the United States.

Defendant acknowledged that he had a number of convictions of driving under the influence of alcohol while he was living in Redwood City. Around that time, he also was using "a little bit" of cocaine.

In 1995, he bought a home in San Jose at 1421 Hillsdale. In about 2000, defendant began working for Kaiser Permanente in Redwood City. He worked for Kaiser for a total of about seven years, first at its Redwood City location for about two or three years and then at its Santa Teresa location. He worked for Kaiser as a painter and taper, mostly on the nightshift.

While working at Kaiser, defendant experienced many headaches, dizziness, anxiety attacks, and numbness. He claimed to have experienced anxiety attacks "pretty much" his "whole life." He had told doctors he suffered "terrible headaches" and his body becomes numb and his hand gets limp. When defendant suffered an anxiety attack, he could not breathe. Defendant testified that, since childhood and throughout adulthood, he had experienced a lot of anxiety attacks, sometimes once or twice a week and sometimes once a month.

Defendant's medical records show that in 1998 defendant was very anxious and complained of a headache in connection with vomiting and nausea. It was the first mention of headache and anxiety in those records. Defendant admitted that he possibly had the flu.

A May 29, 2006 record of a visit to Kaiser indicated he was complaining of anxiety or panic, which had started around 2004. When defendant went to Kaiser for treatment, he received medication for anxiety and he did not have anxiety attacks while taking medication.

Defendant thought he had been laid off from Kaiser in January 2007 or 2008. After being laid off, defendant went downhill emotionally, he became depressed, he

could not function, and he suffered more anxiety attacks. He began drinking five to six beers or more every day. Sometimes he drank wine.

Over time, defendant began drinking more. Sometimes he drove after drinking "a bunch of beers." Defendant testified that he had a high tolerance for alcohol and he was able to drive "perfectly good" after "seven, eight, twelve beers." He acknowledged that he was taking a risk by drinking a lot of alcohol and driving.

From September 1, 2008 to September 13, 2008, he was drinking about a 12-pack of beer every day. At night, he drank alcohol and watched movies because his "head was pounding" and he could not sleep. He slept during the day. On about Friday, September 12, 2008, defendant purchased cocaine at Hillview Park and used all of it.

On the morning of Saturday, September 13, 2008, defendant began drinking beer at his house. He could not remember eating dinner or anything after 7:00 p.m. At night, his wife drove him to a liquor store to buy more beer.

Defendant stopped drinking and went to bed around 3:00 a.m. on September 14, 2008. Defendant's wife woke him up about three hours later when she was leaving but he fell back to sleep. Defendant was woken again when his son came to take his grandson. Defendant had a headache, his leg felt numb, and he was not "feeling good."

Defendant was upset because his son had disturbed his sleep. They loudly argued. Defendant admitted that he punched a hole in the wall.

Defendant recalled that at about 6:10 a.m. on September 14, 2014, police officers came to his house. A female officer spoke to him. Defendant and his son were temporarily handcuffed. After being released, defendant unsuccessfully tried to go back to sleep. His "body was getting numb."

Around 6:30 or 7:00 a.m. on September 14, 2008, defendant decided to drive to buy a beer. Defendant did not have anything to eat. He drove to a gas station at the corner of Cherry and Almaden Expressway to get gas and a beer. There he filled the Suburban with gas and bought and drank a 24-ounce Tecate.

Defendant then went to El Grullense,[8] a restaurant at Tully Road and Alvin, to order food. At the restaurant, he ordered chicken soup and one or two beers, even though he was going to drive. Defendant left the restaurant to go to an ATM.

Defendant returned to the restaurant, parked by the front door, and waited for his food. The manager asked him to leave because he was too loud. Defendant acknowledged he was singing to the music and being loud and boisterous and other customers were leaving. When he left the restaurant, defendant accidently dropped the soup container before getting to his vehicle. When he got into his vehicle, he felt "a little dizzy," he could not "see good," he was becoming more anxious, and his "body was getting numb." Despite how he felt, defendant drove away.

At that point, his plan was to go to Hillview Park to buy $20 worth of cocaine. On his way there, while stopped on Tully Road at King Road and waiting to make a left turn, defendant saw a young male to his left and said, "How you doing?" When the light changed, defendant "took off in front" of Herrera and sped up.

At trial, defendant remembered "almost going unconscious" on King Road and claimed he could not see for 10 to 15 seconds. He almost passed out. He grabbed the steering wheel and he was trying to brake hard to pull over but he could not control his leg and it slipped back to the gas pedal. At trial, defendant admitted that he was weaving on King Road but claimed that it was accidental and he was having a panic attack. Defendant denied that he had been trying to intimidate and frighten Herrera.

Defendant turned right onto Ocala Avenue and pulled over. He remembered a truck pulling up alongside him and the driver rolling down the window and yelling, "You stupid old man. You dumb? You drunk? What's wrong with you? Why . . . you doing this in front of me?" He claimed that the driver said, "If I see you again, I'm going to kick your ass, you dumb drunk." At trial, defendant denied that he had engaged in road

[8] El Grullense and El Grullo appear to refer to the same restaurant.

rage. He claimed to have pulled over because he was feeling bad and having an anxiety attack. At one point, defendant testified that he knew he was not a safe driver, he posed a danger to others, and he needed to pull over on Ocala.

At trial, defendant denied that, after stopping on Ocala Avenue, he drove off first and Herrera followed behind. Defendant denied that he sped around four or five cars on the left and went into the oncoming traffic lane, causing other cars to pull out of his way to avoid a collision.

Defendant claimed that he used the Ocala Avenue entrance to Hillview Park and parked in the lot. Defendant denied that he went around the park by continuing on Ocala, turning left onto Berona Way, and turning left onto Alfred Way. Defendant denied that, on Alfred Way, he drove directly at Herrera who was coming from the opposite direction and forced him to veer right to avoid a head-on collision.

In the Hillview Park parking lot, defendant got out of his vehicle to ask people in the parking lot if they had $20 worth of cocaine and, after about five to seven minutes, Herrera appeared. According to defendant, Herrera confronted him, pushed his chest and knocked him down on his "butt," and yelled at him. Defendant claims that his sandals came off his feet when Herrera pushed him. When others asked what was wrong, Herrera reportedly said, "Well, this stupid old man drunk, he tried to wreck in front of me in King Road. . . ." Defendant tried to explain that he did not do that on purpose and he had health problems. Herrera called defendant a "stupid old man" and a drunk and told defendant to "[g]et out of here before I kick your ass again."

At trial, defendant denied behaving aggressively toward any of the Hispanic soccer players or challenging any of them to fight. Defendant conceded, however, that he may have called them something like "stupid Mexicans" or "fucking Mexicans" and indicated that he had been confused and angry. He could not recall saying in the parking lot, "I'm going to come back and kill you."

Defendant indicated that he was so confused when he returned to his vehicle that he drove around the parking lot in circles because he could not find the way out. Defendant acknowledged, however, that he was very familiar with Hillview Park and its parking lot; he had been there "[m]any, many, many times." He realized that he drove in fast circles around the parking lot but claimed he did that because Herrera had pushed him and knocked him to the ground. He claimed that he left the parking lot despite his condition because Herrera chased him off. Defendant denied directing his vehicle toward people in the parking lot.

After doing several loops around the park's parking lot, defendant finally found the Ocala Avenue exit. He made a left onto Ocala and, by that time, he was having an anxiety attack and his "butt," his leg, and his hand were numb. He testified that he had tried to pull over again but he was having an anxiety attack and he "lost completely" his mind. At one point, defendant claimed that he lost consciousness when he turned left onto Ocala from Hillview Park's parking lot. At another point, defendant claimed that he lost his awareness "right almost before" he reached Berona Way.

Defendant denied directing his vehicle toward pedestrians. He could not recall driving onto the curb and onto the sidewalk toward three pedestrians, hitting a wooden post, or hitting anybody on the morning of September 14, 2008. He had no awareness of that happening. He claimed he did not know he hit pedestrians and he was not conscious at the time of the collision.

At trial, defendant admitted that he crashed his vehicle into three people on the sidewalk and caused the death of two people and caused a third person, Casiano, to suffer great bodily injury.

Defendant did not dispute that, after going up on the sidewalk on Alfred Way, he corrected his car back to the road while avoiding a lamppost, he turned right onto Adrian Way toward the 280 freeway, and, without getting into another accident, he managed to drive miles through intersections controlled by traffic lights, get onto and

drive north on 280, navigate the curved interchange to 87 South, drive on 87 South, and take the Alma exit.

According to defendant, he regained consciousness when making a turn at the stop sign after taking the Alma exit off of 87 South. He remembered hearing a loud, grinding noise and realized he had no tire.

Defendant remembered entering the VTA parking lot at Tamien Station and pulling into an empty parking space. He walked around the vehicle and saw the damage but he did not know what happened. He asked the security guard for a ride home and even offered to pay him. Defendant borrowed a telephone and tried to call his wife. He could not remember his son's telephone number.

According to defendant, his "Plan C" was to call a cab. He asked somebody to call a taxi because he had no telephone. Although defendant did not give the taxi driver his home address at first, he eventually provided it. Defendant claimed that he initially could not remember his address; defendant denied that he was trying to hide personal information.

Defendant remembered the taxi ride from the VTA parking lot to his house. He had a pounding headache, his body was numb, he felt weak and "real dizzy." Defendant admitted that he used profanity toward the taxi driver and explained that he was confused and disoriented. Defendant acknowledged that he "[p]robably" offered to pay the fare before arriving at his house. When the taxi driver began to pull over at defendant's address, defendant saw the police officers and told the taxi driver, "Keep going."

After the taxi was pulled over by police, an officer asked defendant whether he was Armando Ochoa and, after defendant said yes, the officer removed him from the taxi. When asked where his shoes were, defendant said, "At the house," because he did not remember they were at the park. Defendant was handcuffed and placed in a patrol car. An officer subsequently moved defendant to another patrol car and, while defendant was in the patrol car, the officer informed defendant that he was being charged with murder.

While in the bathroom at the police station, defendant grabbed the bag out of the trash receptacle and put it on his head and "swallow[ed] it into [his] mouth" in a suicide attempt because he felt very guilty and bad for what he had done. He tried to commit suicide three more times by hanging his throat over the edge of a table to constrict his airway and stop his breathing. He agreed that he was able to form the intent to kill himself even though he had a high blood-alcohol content and was feeling sick.

Defendant admitted that, when he was interviewed in jail on September 14, 2008, he denied a recent loss of consciousness or a history of loss of consciousness. He indicated that he did not realize he had lost consciousness.

Defendant admitted that on September 14, 2008, he was an alcoholic and he was using cocaine. Defendant acknowledged his numerous convictions. He understood that he had a problem with driving too fast.

In May 1993, defendant pleaded guilty to a fourth DUI. The court required him to attend a very intensive drug and alcohol education program. In 1998, he pleaded guilty to felony possession of cocaine for sale (Health & Saf. Code, § 11351).

In 2005, defendant pleaded guilty to a misdemeanor hit and run. Defendant claimed that he sped up to go to work, unaware that he had struck anyone. But he admitted that, instead of remaining in the fast lane after passing a vehicle, he immediately moved across four lanes of traffic and exited at Great America Parkway. Defendant acknowledged that, during that incident, he turned right from Great America Parkway onto "Mission" but he denied that he suddenly made a U-turn against a red light because he was trying to shake the driver of the car he had struck. He acknowledged that he then made a right turn onto Great America Parkway and then a left onto Tasman, where he parked in the driveway of a mobile home park. At trial, he claimed that he went there to pick up a coworker but he could not recall the coworker's name. Defendant later told police that it was possible that he had hit Tinsley's car.

Defendant knew it was against the law to drive under the influence of alcohol or a drug and the drinking and driving posed "a real risk of danger to human life." Sometimes his wife confiscated his keys because he was too intoxicated to drive. Defendant agreed with her that, if he drove while intoxicated, he would put other people's lives and his own life at risk.

Defendant admitted Alcoholics Anonymous (AA) meetings were free. He had initially attended those meetings under court order but he did not maintain his attendance. After being laid off, defendant began drinking again and using cocaine. He admitted that he did not go to AA or Narcotics Anonymous when he began drinking a lot and abusing cocaine.

Defendant acknowledged that his own father had been killed by a hit-and-run driver while walking across King Road. He knew that a vehicle could kill a person.

As the result of medical attention following an incident on Sunday, January 28, 2007, in which defendant was beaten by five Hispanic males in Hillview Park where he had been drinking, defendant learned that he had an arachnoid cyst. In October 2011, defendant saw Dr. Lee at Valley Medical Center. Defendant testified that, after he told the doctor of his intermittent symptoms of headaches, tingling and limp hands, and a numb body, the doctor told him that there was nothing wrong with him. Dr. Lee did not ask about childhood health problems.

Defendant's mother, Candelaria Ochoa, testified that defendant had health problems as a child. He fainted a lot and his head hurt a lot and "he would get a fever." She never took him to a doctor while they lived in Mexico.

Deborah testified that defendant and she were married in 1981. They moved to their home on Hillsdale in 1996.

Defendant's drinking and substance abuse caused a great strain on their marital relationship. Defendant had attended court-ordered AA or Narcotics Anonymous

meetings but he did not go voluntarily. Deborah filed for divorce on September 24, 2008 and they divorced in 2009.

Before defendant lost his Kaiser job as a painter and taper in January 2008, defendant's health problems included complaints of body ache and headache, bronchitis and breathing problems, and panic attacks. He also had a problem with alcohol and he had used cocaine for 20 years or more.

After losing his Kaiser job, defendant cried for two days and Deborah took him to the emergency room. Defendant had a nervous breakdown and he was treated with Valium and Prozac. The insurance ran out in July 2008 and, after that, defendant no longer had medication. Defendant drank most days. He was drinking as many as 18 beers in one day.

During the summer of 2008, while Deborah was away from home, she received a call from her son saying defendant was fighting with him. She called 911 and asked police to take defendant to "Valley Med" for a psychological evaluation. Deborah wanted to put defendant in "rehab" but they were "barely making it" financially and defendant said they could not afford it.

On Saturday, September 13, 2008, defendant started drinking in the morning and continued drinking until Sunday morning. Deborah left their home on Hillsdale before 6:00 a.m. because her mother and she were taking a bus to Colusa, a casino. When she got into the car, Deborah called her son Eric and instructed him to take his son, who was sleeping in her bed, upstairs so defendant could sleep. Also, defendant was in no condition to take care of a baby. A short time later, she received a call from Eric, who said that defendant was arguing with him and asked her to come back.

Deborah returned home and saw a hole that defendant had punched in the wall. She was still there when the police arrived. Defendant appeared to be drunk; "you could smell it." Around 11:00 a.m., Deborah received a call from Eric informing her that defendant had been arrested.

Officer O'Brien, who was also called as a witness by defendant, agreed that the Suburban hit the wooden post located next to the valve box near the sidewalk. In his opinion, the tire marks down approximately the center of the sidewalk were left by the Suburban's right wheels. The distance from where the Suburban was completely on Alfred Way after turning from Berona Way to where the Suburban rode up onto the curb was 137 feet. At an estimated speed of about 34 miles per hour, it would have taken about two and three-quarters of a second to go that distance. At that same speed, it would have taken about two seconds to travel 99 feet, which was the distance between the first tire marking on the curb and the last tire marking on the curb. Based on the tire marks, the debris, and the final position of rest of Siruno, the only victim for whom the police had a final position of rest, Officer O'Brien's opinion was that the Suburban hit the pedestrians first and then hit the post, which broke in two. The officer did not believe that the post hit Casiano because he would have been airborne before the vehicle hit the post.

Dr. Knut Gustav Wester, a retired professor of neurosurgery at the University of Bergen in Norway, testified as an expert in the fields of neurology and neurosurgery. According to Dr. Wester, an arachnoid cyst is a congenital malformation of the thin membrane surrounding the brain.

A published 2007 study, in which Dr. Wester was involved, investigated 108 adult patients with temporal cysts. Eighty percent of them complained of headaches, a much smaller percentage complained of dizziness, and 12.5 percent had epilepsy. Fatigue is another symptom associated with temporal cysts. A very rare symptom is paresis (mild paralysis).

An arachnoid cyst may cause a person to be more anxious than the normal population and, consequently, more prone to having an anxiety or panic attack. A person having an anxiety attack typically hyperventilates, which reduces the carbon dioxide in the blood to a subnormal level and reduces the blood supply to the brain. If continued,

hyperventilation can lead to confusion that can be regarded as a loss of consciousness. As to a person's memory during an anxiety attack, the person "can be upright and do things, but . . . have no recollection whatsoever of what happened." A very strong anxiety attack may qualify as a blackout.

A published 2006 German study by Dr. Weber looked at about 2,500 clinically healthy males applying to be Air Force pilots and it found about 1.5 percent had arachnoid cysts. Dr. Wester accepted the study's conclusion as to the benign and clinically silent nature of arachnoid cysts but only as to that population. A 2012 article authored by six doctors published in the "Journal of Neurosurgery," one of the two top-ranking neurosurgical journals in the world, reported that the doctors' study found that arachnoid cysts are a common incidental finding on an MRI in all age groups. Dr. Wester did not agree with that conclusion. Their study also concluded that arachnoid cysts are symptomatic in only a small number of patients. Dr. Wester agreed that a person can have an arachnoid cyst and not be symptomatic.

Dr. Wester reviewed all of defendant's medical records. The first reference in those medical records to an arachnoid cyst was in early 2007. A January 2007 CAT scan, done to rule out intracranial bleeding, disclosed a "relatively large arachnoid cyst in [defendant's] left temporal fossa." An MRI was taken in February 2007. Dr. Wester did not find a diagnosis of epileptic seizures in defendant's medical records. Defendant had seen a doctor for six panic attacks between May 29, 2006 and January 10, 2008. Defendant had reported headaches since 1998. Dr. Wester came across two references indicating that defendant rated a headache as a seven or eight on a scale of 10 but those headaches had occurred after his arrest.

Dr. Wester disagreed with the assessment of Dr. Lee that defendant's headaches were unrelated to his arachnoid cyst. Dr. Wester believed that it was "most likely" that defendant's arachnoid cyst "causes his headach[es] and his anxiety because it's well known that patients with arachnoid cysts, especially in the left temporal lobe, have an

increased level of anxiety to a much, much higher degree than the normal population." Dr. Wester agreed that defendant's arachnoid cyst had been stable since it was discovered in 2007.

Since Dr. Wester had done no neuropsychological testing of defendant, he could not say whether defendant had any neurocognitive impairment due to his arachnoid cyst. Dr. Wester could not say anything about the cyst's pressure against the brain tissue, since he had not measured it.

In Dr. Wester's opinion, if a person who has an arachnoid cyst and is sleep deprived has "an anxiety event," the event can trigger an anxiety attack. In his opinion, if a person who has an arachnoid cyst on his left temporal lobe suffers an anxiety attack after experiencing a stressful event and then is involved in a traffic collision, it is possible that the person would be "functionally unconscious" of being in the collision and not remember it.

Dr. Wester acknowledged that the neuroassessment of defendant conducted at about 5:10 p.m. on September 14, 2008 indicated that his level of consciousness was determined to be PERRLA[9] and reflected that defendant denied a recent loss of consciousness and any history of seizure.

Dr. Rajeev Kelkar, who was qualified as an expert in the field of accident reconstruction and biomechanics, reviewed the police report and photographs. In his opinion, there were two scenarios. He believed that one reasonable interpretation of the evidence was that the area of impact was on the sidewalk as indicated by Officer O'Brien. Dr. Kelkar alternatively theorized that the pedestrians may have seen the Suburban and stepped to the side a few feet. He suggested an alternative area of

[9] PERRLA means "[p]upils equal, round, react to light and accommodation." (Hirschman, Med. Proof of Soc. Sec. Disab. 2d (2014 ed.) Appendix X, Commonly Used Medical Abbreviations.)

impact just west of the valve box, slightly off the sidewalk in the grass, which he considered more reasonable. This scenario resulted in a shorter "throw distance" (45 feet) to the final position of rest of Siruno's body and a lower range of speeds, 20 to 32 miles per hour. In his opinion, the Suburban may have struck the signpost before hitting the pedestrians and the signpost may have hit Siruno before the Suburban did.

C. *Prosecution's Rebuttal Case*

Moayer testified as an expert that, based on certain assumptions regarding defendant's consumption of beer on September 13, 2008 and September 14, 2008 (including his consumption of a 24-ounce beer at 6:45 a.m. and another one or two 12-ounce beers between 7:00-8:00 a.m. on the morning of September 14, 2008), a burn-off rate of an average of .02 percent per hour, and defendant's blood alcohol levels when tested on September 14, 2008, defendant had a blood alcohol level of approximately .25 percent when he left his house at about 6:45 a.m. on September 14, 2008. A person with a blood alcohol content of .08 percent will be too impaired to drive safely.

Phillip Garcia, a San Jose Police Sergeant, arrived in a patrol car at Hillview Park at approximately 6:00 p.m. on January 28, 2007. Sergeant Garcia made contact with defendant. As the sergeant was exiting his car, defendant, who was standing in the front yard of 2454 Ocala Avenue, ran toward him, jumped the fence, and yelled, "Get over here, fucker. I want your fucking help." Sergeant Garcia learned that defendant had been assaulted in the park. Defendant was hostile and uncooperative and exhibited symptoms of being under the influence of alcohol, including slurred speech, a strong odor of alcoholic beverages, a staggered gait, and bloodshot eyes. When Sergeant Garcia attempted to inquire about the incident, defendant became extremely angry and began screaming, "Fuck you. You're a fucking liar." When defendant raised his fist toward Sergeant Garcia, another officer handcuffed defendant until the San Jose Fire Department arrived on the scene to attend to defendant's injuries.

Lauren Vidal, a San Jose police officer, went to 1421 Hillsdale Avenue in San Jose in response to a call from defendant's wife that was received shortly before midnight on July 12, 2008. She told Officer Vidal that defendant and she had been arguing and defendant had "started throwing things." The officer made contact with defendant. His breath smelled of alcohol, his eyes were bloodshot, his speech was slurred, and his gait was unsteady. Defendant was taken into custody.

III

Discussion

A. *Lack of Instruction on Involuntary Manslaughter*

1. *Background*

Defendant asked the trial court to give a proposed instruction on involuntary manslaughter, a modified version of CALCRIM No. 580. The court refused. On appeal, defendant contends that the trial court erred in refusing to instruct on involuntary manslaughter as a lesser included offense of murder.

2. *Duty to Instruct*

"The trial court is obligated to instruct the jury on all general principles of law relevant to the issues raised by the evidence, whether or not the defendant makes a formal request. (*People v. Blair* (2005) 36 Cal.4th 686, 745; *People v. Breverman* (1998) 19 Cal.4th 142, 154 [duty to instruct on court's own motion]; *People v. Flannel* (1979) 25 Cal.3d 668, 684 [duty to instruct upon request].) 'That obligation encompasses instructions on lesser included offenses if there is evidence that, if accepted by the trier of fact, would absolve the defendant of guilt of the greater offense but not of the lesser.' (*People v. Blair*, *supra*, 36 Cal.4th at p. 745, citing *People v. Memro* (1995) 11 Cal.4th 786, 871; see also *People v. Breverman*, *supra*, 19 Cal.4th at p. 154.) 'To justify a lesser included offense instruction, the evidence supporting the instruction must be substantial—that is, it must be evidence from which a jury composed of reasonable persons could conclude that the facts underlying the particular instruction exist.' (*People*

v. Blair, *supra*, 36 Cal.4th at p. 745, citing *People v. Breverman*, *supra*, 19 Cal.4th at p. 162.)" (*People v. Burney* (2009) 47 Cal.4th 203, 250.) " 'On appeal, we review independently the question whether the trial court improperly failed to instruct on a lesser included offense.' (*People v. Souza* (2012) 54 Cal.4th 90, 113.)" (*People v. Banks* (2014) 59 Cal.4th 1113, 1160 disapproved on another ground in *People v. Banks* (2015) 61 Cal.4th 363, 391 fn. 3.)

"Manslaughter is the unlawful killing of a human being without malice." (§ 192.) Voluntary and involuntary manslaughter are generally considered lesser included offenses of murder. (See *People v. Thomas* (2012) 53 Cal.4th 771, 813; *People v. Ochoa* (1998) 19 Cal.4th 353, 422 (*Ochoa*).) Section 192, subdivision (b), defines involuntary manslaughter as "the unlawful killing of a human being without malice" "in the commission of an unlawful act, not amounting to a felony; or in the commission of a lawful act which might produce death, in an unlawful manner, or without due caution and circumspection." It specifically provides: "This subdivision shall not apply to *acts committed in the driving of a vehicle*." (*Ibid*., italics added.)

3. *Equal Protection*

Insofar as we can discern, defendant is arguing that, if he had killed with a different instrumentality, in other words not by "acts committed in the driving of a vehicle," he would have been entitled to an involuntary manslaughter instruction under section 192, subdivision (b). He asserts that this "unequal situation" violates his constitutional right to equal protection of the law.

"[I]n our tripartite system of government it is the function of the legislative branch to define crimes and prescribe punishments, and that such questions are in the first instance for the judgment of the Legislature alone. [Citations.]" (*In re Lynch* (1972) 8 Cal.3d 410, 414; see *Liparota v. United States* (1985) 471 U.S. 419, 424, 425, fn. 6.) "The courts may not *expand* the Legislature's definition of a crime (*Keeler v. Superior Court* [1970] 2 Cal.3d [619,] 632), nor may they *narrow* a clear and specific definition."

(*People v. Farley* (2009) 46 Cal.4th 1053, 1119.) " 'It is the prerogative, indeed the duty, of the Legislature to recognize degrees of culpability when drafting a Penal Code.' (*Michael M. v. Superior Court* (1979) 25 Cal.3d 608, 613 [rejecting an equal protection challenge against the statutory rape law].)" (*People v. Wilkinson* (2004) 33 Cal.4th 821, 840.) The California Legislature exercised its prerogative by excluding "acts committed in the driving of a vehicle" from the definition of involuntary manslaughter (§ 192, subd. (b)). The Legislature chose to create a separate crime of vehicular manslaughter, which was added to section 192 in 1945.[10] (See Stats.1945, ch. 1006, § 1, pp. 1942-1943.) The Legislature also established the separate crimes of gross vehicular manslaughter while intoxicated and vehicular manslaughter while intoxicated.[11] (See § 191.5, subds. (a) & (b).)

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10 In 2008, section 192, subdivision (c), defined vehicular manslaughter as follows: (1) Except as provided in subdivision (a) of Section 191.5, driving a vehicle in the commission of an unlawful act, not amounting to felony, and with gross negligence; or driving a vehicle in the commission of a lawful act which might produce death, in an unlawful manner, and with gross negligence. [¶] (2) Driving a vehicle in the commission of an unlawful act, not amounting to felony, but without gross negligence; or driving a vehicle in the commission of a lawful act which might produce death, in an unlawful manner, but without gross negligence. [¶] (3) Driving a vehicle in connection with a violation of paragraph (3) of subdivision (a) of Section 550, where the vehicular collision or vehicular accident was knowingly caused for financial gain and proximately resulted in the death of any person. This provision shall not be construed to prevent prosecution of a defendant for the crime of murder." (Stats. 2006, ch. 91, § 2, p. 1632.) In 2008, a violation of subdivision (c) of section 192 was punishable as follows: "(1) A violation of paragraph (1) of subdivision (c) of Section 192 is punishable either by imprisonment in the county jail for not more than one year or by imprisonment in the state prison for two, four, or six years. [¶] (2) A violation of paragraph (2) of subdivision (c) of Section 192 is punishable by imprisonment in the county jail for not more than one year. [¶] (3) A violation of paragraph (3) of subdivision (c) of Section 192 is punishable by imprisonment in the state prison for 4, 6, or 10 years." (Stats. 2006, ch. 91, § 4, pp. 1633-1634 [§ 193].)

11 In 2008, section 191.5 provided in pertinent part: "(a) Gross vehicular manslaughter while intoxicated is the unlawful killing of a human being without malice aforethought, in the driving of a vehicle, where the driving was in violation of (continued)

Defendant has not shown that the legislative distinctions implicate any fundamental right or involves a suspect classification. "Where, as here, a statute involves neither a suspect class nor a fundamental right, it need only meet minimum equal protection standards, and survive 'rational basis review.' (*People v. Wilkinson* (2004) 33 Cal.4th 821, 836.)" (*People v. Turnage* (2012) 55 Cal.4th 62, 74; see *People v. Wilkinson*, *supra*, at pp. 836-838 [rejecting strict scrutiny standard and applying rational basis test to equal protection challenge to provisions criminalizing and punishing battery on a custodial officer].)

"[A] classification neither involving fundamental rights nor proceeding along suspect lines is accorded a strong presumption of validity. [Citations.] Such a classification cannot run afoul of the Equal Protection Clause if there is a rational

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Section 23140, 23152, or 23153 of the Vehicle Code, and the killing was either the proximate result of the commission of an unlawful act, not amounting to a felony, and with gross negligence, or the proximate result of the commission of a lawful act that might produce death, in an unlawful manner, and with gross negligence. [¶] (b) Vehicular manslaughter while intoxicated is the unlawful killing of a human being without malice aforethought, in the driving of a vehicle, where the driving was in violation of Section 23140, 23152, or 23153 of the Vehicle Code, and the killing was either the proximate result of the commission of an unlawful act, not amounting to a felony, but without gross negligence, or the proximate result of the commission of a lawful act that might produce death, in an unlawful manner, but without gross negligence. [¶] (c)(1) Except as provided in subdivision (d), gross vehicular manslaughter while intoxicated in violation of subdivision (a) is punishable by imprisonment in the state prison for 4, 6, or 10 years. [¶] (2) Vehicular manslaughter while intoxicated in violation of subdivision (b) is punishable by imprisonment in a county jail for not more than one year or by imprisonment in the state prison for 16 months or 2 or 4 years. [¶] (d) A person convicted of violating subdivision (a) who has one or more prior convictions of this section or of paragraph (1) of subdivision (c) of Section 192, subdivision (a) or (b) of Section 192.5 of this code, or of violating Section 23152 punishable under Sections 23540, 23542, 23546, 23548, 23550, or 23552 of, or convicted of Section 23153 of, the Vehicle Code, shall be punished by imprisonment in the state prison for a term of 15 years to life. Article 2.5 (commencing with Section 2930) of Chapter 7 of Title 1 of Part 3 shall apply to reduce the term imposed pursuant to this subdivision." (Stats. 2006, ch. 91, § 1, p. 1631.)

relationship between the disparity of treatment and some legitimate governmental purpose. [Citations.] Further, a legislature that creates these categories need not 'actually articulate at any time the purpose or rationale supporting its classification.' [Citations.] Instead, a classification 'must be upheld against equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification.' [Citations.]" (*Heller v. Doe* (1993) 509 U.S. 312, 319-320 (*Heller)*; see *Johnson v. Department of Justice* (2015) 60 Cal.4th 871, 881.)

"A State, moreover, has no obligation to produce evidence to sustain the rationality of a statutory classification. '[A] legislative choice is not subject to courtroom factfinding and may be based on rational speculation unsupported by evidence or empirical data.' [Citations.]" (*Heller, supra*, 509 U.S. at p. 320.) "[I]t is entirely irrelevant for constitutional purposes whether the conceived reason for the challenged distinction actually motivated the legislature. [Citations.]" (*F.C.C. v. Beach Communications, Inc*. (1993) 508 U.S. 307, 315.) "A statute is presumed constitutional, [citation] and '[t]he *burden is on the one attacking the legislative arrangement to negative every conceivable basis which might support it*,' [citation], whether or not the basis has a foundation in the record. Finally, courts are compelled under rational-basis review to accept a legislature's generalizations even when there is an imperfect fit between means and ends." (*Heller, supra,* at pp. 320-321, italics added.) "Equal protection analysis does not entitle the judiciary to second guess the wisdom, fairness, or logic of the law. (*Heller v. Doe* (1993) 509 U.S. 312, 319.)" (*People v. Turnage, supra,* 55 Cal.4th at p. 74.)

Even assuming arguendo that defendant is similarly situated to persons who have committed involuntary manslaughter by acts not "committed in the driving of a vehicle" (§ 192, subd. (b)), he has not met his burden by negating all rational bases for the statutory distinctions. While motor vehicles serve as a pervasive and accepted mode of transportation, they also pose a significant potential for causing death, especially when

drivers are intoxicated. (See *Motor Vehicle Mfrs. Ass. v. State Farm Mut.* (1983) 463 U.S. 29, 32-33 ["The development of the automobile gave Americans unprecedented freedom to travel, but exacted a high price for enhanced mobility. Since 1929, motor vehicles have been the leading cause of accidental deaths and injuries in the United States"].) The California Legislature could reasonably exclude vehicular killings from the definition of involuntary manslaughter and define separate vehicular manslaughter crimes, which provide for a wider range of punishment than does involuntary manslaughter, to deter and punish dangerous driving resulting in fatalities, especially where the driver is intoxicated.[12] (Compare § 192, subd. (b), with § 192, subd. (c), and § 191.5, subd. (c) & (d).) Defendant has failed to show that he was deprived of equal protection of the law.

4. *Due Process*

Defendant also asserts that, as a matter of due process, the trial court had a sua sponte duty to instruct the jury on involuntary manslaughter as a lesser included offense of murder based on the evidence. He argues that "if the jury had been provided with the option of involuntary manslaughter verdicts, accompanied by appropriate instructions, . . . it is reasonably likely that [he] would have been found guilty of that offense (rather than murder) based upon a finding that he was unconscious due to voluntary intoxication at the time of the collision . . . or that he acted in a grossly negligent manner toward the victims, without possessing an intent to kill or conscious disregard of the risk to human life . . . ."

Relying on *People v. Turk* (2008) 164 Cal.App.4th 1361 and *Ochoa*, *supra*, 19 Cal.4th 353, defendant asserts that he was entitled to an involuntary manslaughter instruction based on the evidence that he was unconscious due to intoxication and his

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[12] In 2008, involuntary manslaughter was "punishable by imprisonment in the state prison for two, three, or four years." (Stats. 2006, ch. 91, § 4, p. 1633.)

mental impairment resulting from his arachnoid cyst. Those cases did not involve a vehicular death. (*People v. Turk*, *supra*, at pp. 1365-1366; *Ochoa*, *supra*, at pp. 385-387.) He also suggests that an involuntary manslaughter instruction was warranted under a theory he acted in "an irrational fit of rage."

We reiterate, by definition, the crime of involuntary manslaughter does not encompass "acts committed in the driving of a vehicle." (§ 192, subd. (b).) Consequently, the trial court had no duty to instruct sua sponte on that offense because the requirement that a jury be instructed on lesser included offenses extends only to those lesser included offenses supported by substantial evidence. Failure to instruct on involuntary manslaughter did not violate his constitutional rights to due process.

5. *Ineffective Assistance of Counsel*

Defendant alternatively argues that his two murder convictions must be reversed because his trial counsel rendered ineffective assistance by failing to "specifically object to and argue against the court's refusal to give involuntary manslaughter instructions . . . ." He claims that his counsel had no satisfactory tactical reason for not making such objections and arguments.

"To prevail on a claim of ineffective assistance of counsel, a defendant must show both that counsel's performance was deficient and that the deficient performance prejudiced the defense. (*Strickland* [*v. Washington* (1984) 466 U.S. 668,] 687-688, 693; [*People v.*] *Ledesma* [(1987) 43 Cal.3d 171,] 216.) Counsel's performance was deficient if the representation fell below an objective standard of reasonableness under prevailing professional norms. (*Strickland*, at pp. 687-688.) Prejudice exists where there is a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different. (*Id*. at pp. 693-694.)" (*People v. Benavides* (2005) 35 Cal.4th 69, 92-93.) Since, as explained, defendant was not entitled to a jury instruction on involuntary manslaughter (§ 192, subd. (b)), defendant has shown neither deficient performance nor prejudice.

B. *CALCRIM No. 3425*

1. *Contentions and Background*

Defendant asserts that the pre-2013 version of CALCRIM No. 3425 given in this case misstated the law by informing the jury that it should find that he was conscious based on proof beyond a reasonable doubt that he acted "as if he were conscious," which he maintains constituted "an illicit presumption." He contends that, as a result, this instruction "invaded the jury's province and lowered the prosecution's burden of proof, thus violating appellant's constitutional right to a fair jury trial and due process of law."

"Unconsciousness, if not induced by voluntary intoxication, is a complete defense to a criminal charge. (§ 26, class Four; *People v. Coogler* (1969) 71 Cal.2d 153, 170; *People v. Newton* (1970) 8 Cal.App.3d 359, 376; see also § 20 [to constitute a crime there must exist a joint operation of act and intent].) To constitute a defense, unconsciousness need not rise to the level of coma or inability to walk or perform manual movements; it can exist 'where the subject physically acts but is not, *at the time*, conscious of acting.' (*Newton*, at p. 376.)" (*People v. Halvorsen* (2007) 42 Cal.4th 379, 417, italics added; *Ochoa, supra*, 19 Cal.4th at p. 424.) Failure to later recall what happened is different.

The trial court instructed with regard to unconsciousness: "The defendant is not guilty of murder, attempted murder, or assault with a deadly weapon if he acted while legally unconscious. Someone is legally unconscious when he or she is not conscious of his or her actions. *Someone may be unconscious even though able to move*. [¶] Unconsciousness may be caused by a blackout or an epileptic seizure or involuntary intoxication *or an anxiety attack*." (Italics added.) It further instructed: "The People must prove beyond a reasonable doubt that defendant was conscious when he acted. *If there is proof beyond a reasonable doubt that the defendant acted as if he were conscious, you should conclude that he was conscious. If, however, based on all the evidence, you have a reasonable doubt that he was conscious, you must find him not guilty*." (Italics added.)

"The genesis of the instruction is *People v. Hardy* (1948) 33 Cal.2d 52 (*Hardy*). [Citation.]" (*People v. Mathson* (2012) 210 Cal.App.4th 1297, 1317 (*Mathson*).) "In *Hardy*, our high court discussed the judicially created presumption that a person who acts conscious is conscious. (*Hardy*, *supra*, 33 Cal.2d at p. 63.)" (*Ibid*.) It "serves only to require the defendant to produce sufficient evidence to raise a reasonable doubt in the minds of the jury. (*Hardy*, *supra*, 33 Cal.2d at p. 64.)" (*Id*. at p. 1318.)

The current version of CALCRIM No. 3425 states: "The People must prove beyond a reasonable doubt that the defendant was conscious when (he/she) acted. If there is proof beyond a reasonable doubt that the defendant *acted as if (he/she) were conscious*, you should conclude that (he/she) was conscious, *unless* based on all the evidence, you have a reasonable doubt that (he/she) was conscious, in which case you must find (him/her) not guilty." (CALCRIM No. 3425 (2014 ed.) p. 931, italics added.)

2. *Legal Unconsciousness*

Defendant asserts that the following sentence of the challenged instruction misstates the law: "If there is proof beyond a reasonable doubt that the defendant acted as if he were conscious, you should conclude that he was conscious."

"It is well established in California that the correctness of jury instructions is to be determined from the entire charge of the court, not from a consideration of parts of an instruction or from a particular instruction. [Citations.]" (*People v. Burgener* (1986) 41 Cal.3d 505, 538, disapproved on another ground in *People v. Reyes* (1998) 19 Cal.4th 743, 756.) "The principle that jury instructions are read as a whole and in relation to one another [citation] applies equally to the different parts of a single instruction." (*People v. Hajek* (2014) 58 Cal.4th 1144, 1224-1225.)

When viewed in its entirety and in context, the challenged instruction does not misstate the law. The jury was instructed that "[s]omeone is legally unconscious when he or she is not conscious of his or her actions." It made clear that a person may be able to move yet still be unconscious. When the challenged sentence is read together with the

immediately preceding sentence and the very next sentence, it becomes clear that the prosecution must prove beyond a reasonable doubt that defendant was in fact conscious and a reasonable doubt that defendant was conscious based on the evidence requires a finding of not guilty.

3. *Due Process*

Defendant further argues that the challenged instruction "amounted to a mandatory presumption or burden-shifting presumption" that deprived him of "his due process right, under the Fifth, Sixth, and Fourteenth Amendments of the United States Constitution, to have the jury determine 'upon proof beyond a reasonable doubt . . . every fact necessary to constitute the crime with which he is charged.' [Citations.]"

"The Due Process Clause of the Fourteenth Amendment 'protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.' *In re Winship* [1970] 397 U.S. [358,] 364. This 'bedrock, "axiomatic and elementary" [constitutional] principle,' [citation], prohibits the State from using evidentiary presumptions in a jury charge that have the effect of relieving the State of its burden of persuasion beyond a reasonable doubt of every essential element of a crime. [Citations.]" (*Francis v. Franklin* (1985) 471 U.S. 307, 313 (*Francis*).)

The United States Supreme Court classifies an instructional presumption as either a "mandatory presumption" or as a "permissive inference." (*Francis*, *supra*, 471 U.S. at p. 314.) "A mandatory presumption instructs the jury that it must infer the presumed fact if the State proves certain predicate facts." (*Ibid*., fn. omitted.) "A mandatory presumption may be either conclusive or rebuttable. A conclusive presumption removes the presumed element from the case once the State has proved the predicate facts giving rise to the presumption. A rebuttable presumption does not remove the presumed element from the case but nevertheless requires the jury to find the presumed element

unless the defendant persuades the jury that such a finding is unwarranted. [Citation.]" (*Id*. at p. 314, fn. 2.)

"An irrebuttable or conclusive presumption relieves the State of its burden of persuasion by removing the presumed element from the case entirely if the State proves the predicate facts. A mandatory rebuttable presumption does not remove the presumed element from the case if the State proves the predicate facts, but it nonetheless relieves the State of the *affirmative burden of persuasion* on the presumed element by instructing the jury that it must find the presumed element *unless the defendant persuades the jury not to make such a finding*." (*Francis, supra,* 471 U.S. at p. 317, italics added.) Mandatory presumptions "violate the Due Process Clause if they relieve the State of the burden of persuasion on an element of an offense. [Citations.]" (*Id*. at p. 314.)

"A permissive inference suggests to the jury a possible conclusion to be drawn if the State proves predicate facts, but does not require the jury to draw that conclusion." (*Francis, supra*, 471 U.S. at p. 314.) "A permissive inference does not relieve the State of its burden of persuasion because it still requires the State to convince the jury that the suggested conclusion should be inferred based on the predicate facts proved. . . . A permissive inference violates the Due Process Clause only if the suggested conclusion is not one that reason and common sense justify in light of the proven facts before the jury. [Citation.]" (*Id*. at pp. 314-315.) "To the extent that a presumption imposes an extremely low burden of production—e. g., being satisfied by 'any' evidence—it may well be that its impact is no greater than that of a permissive inference, and it may be proper to analyze it as such. See generally *Mullaney v. Wilbur* [(1975)] 421 U.S. 684, 703 n. 31."[13] (*Ulster County Court v. Allen* (1979) 442 U.S. 140, 158, fn. 16.)

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[13] In *Francis, supra*, 471 U.S. at p. 314, fn. 3, the United States Supreme Court stated that it was "not required to decide in this case whether a mandatory presumption that shifts only a burden of production to the defendant is consistent with the Due Process Clause" and it "express[ed] no opinion on that question."

In *People v. Babbitt* (1988) 45 Cal.3d 660 (*Babbitt*), the trial court instructed pursuant to former CALJIC No. 4.31, which provided: " 'If the evidence establishes beyond a reasonable doubt that at the time of the commission of the alleged offense the defendant acted as if he were conscious, you should find that he was conscious, unless from all the evidence you have a reasonable doubt that he was in fact conscious at the time of the alleged offense. [¶] []If the evidence raises a reasonable doubt that he was in fact conscious, you must find that he was then unconscious.' " (*Babbitt*, *supra*, at pp. 690, 691 fn. 9.) The defendant contended that the trial court committed constitutional error in giving that instruction because it "create[d] a mandatory, rebuttable presumption that the jury would have understood as shifting to defendant the burden of proving unconsciousness." (*Id*. at pp. 690-691.) He further argued that the instruction created a presumption of consciousness and thereby "impermissibly lightened the prosecutor's burden of proving intent or, stated conversely, impermissibly shifted to defendant the burden of negating an element of the charged offenses." (*Id*. at p. 691.)

The California Supreme Court in *Babbitt* observed that, under the challenged instruction, "defendant's burden was only to raise a reasonable doubt that he was conscious, and then only if the prosecution's proof did not of itself raise such a doubt. [Citations.]" (*Babbitt, supra*, 45 Cal.3d at p. 694.) It concluded: "[B]ecause consciousness is not an element of the offense of murder (nor of any offense), CALJIC No. 4.31 does not impermissibly shift to the defendant the burden of negating an element, nor does the instruction violate due process by impermissibly lightening the prosecution's burden of proving every element beyond a reasonable doubt. Consequently, there is no constitutional impediment to the state's use of a rebuttable presumption in meeting its assumed burden—once the issue has been raised—to prove consciousness beyond a reasonable doubt. [Citations.]" (*Id*. at pp. 693-694.)

In *People v. Clark* (1993) 5 Cal.4th 950, 1020, disapproved on another ground in *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22, the trial court instructed pursuant to

former CALJIC No. 4.31: "If the evidence establishes beyond a reasonable doubt that at the time of the commission of the alleged offense the Defendant acted as if he were conscious, you should find that he was conscious unless from all the evidence you have a reasonable doubt that he was, in fact, conscious at the time of the alleged offense. If the evidence raises a reasonable doubt that he was, in fact, conscious you must find that he was then unconscious." (*People v. Clark*, *supra*, at p. 1020 & fn. 35.) The defendant contended that the instruction "unconstitutionally shifted the burden to defendant to prove his unconsciousness in violation of his due process rights under the federal and state Constitutions." (*Id*. at p. 1020.) After noting that it had previously rejected such claim in *Babbitt*, *supra*, 45 Cal.3d at pp. 693-694, the California Supreme Court found no basis for reconsidering its conclusion. (*Id*. at pp. 1020-1021.)

In *Mathson*, *supra*, 210 Cal.App.4th 1297, the trial court gave an instruction modeled on CALCRIM No. 3425, instructing in part: " 'The People must prove beyond a reasonable doubt that the defendant was legally conscious when he acted. If there is proof beyond a reasonable doubt that the defendant acted as if he were conscious, you should conclude that he was legally conscious. If, however, based on all of the evidence you have a reasonable doubt that he was legally conscious, you must find him not guilty.' " (*Mathson*, *supra*, at p. 1310.) The defendant contended on appeal that the instruction improperly "told the jury to conclude defendant was conscious without considering the expert testimony" regarding sleep driving, a rare side effect of Ambien, and "lighten[ed] the prosecution's burden of proof in violation of his constitutional rights to a jury trial and due process." (*Id*. at p. 1317.)

The Third District, Court of Appeal, determined in *Mathson* that the instruction did not violate defendant's due process rights but agreed that former CALCRIM No. 3425 was "potentially confusing and should be modified." (*Mathson*, *supra*, 210 Cal.App.4th at p. 1317.) The court found that the language of the standard instruction problematic in two ways. (*Id*. at p. 1323.)

The appellate court explained: "In CALCRIM No. 3425, the critical language is located in a separate sentence, disconnected from the direction ('should conclude') that precedes it. So the jury is first told it should conclude defendant was conscious if he 'acted as if he were conscious.' That command is not expressly qualified by an 'unless' clause but is instead followed by a separate sentence that begins, 'If, however.' 'If, however' is *not* the same as "unless." In context, it could mean that the jury is only to consider whether there is reasonable doubt based on the other evidence if it finds that a defendant acted as if he was not conscious. The instruction is unnecessarily ambiguous." (*Mathson*, *supra*, 210 Cal.App.4th at p. 1323.) "Second, instead of telling the jurors they must find the defendant unconscious if they have a reasonable doubt that the defendant was conscious, the final sentence directs the jurors to find the defendant *not guilty.* As we have discussed, in an intoxication case, a defendant who was unconscious must be found not guilty only if the intoxication was involuntary. A defendant who was unconscious may still be found guilty if the intoxication was voluntary. Because the last sentence compels the jury to reach a not guilty verdict instead of compelling a finding regarding unconsciousness, that sentence is potentially confusing."[14] (*Ibid*.)

In *Mathson*, the appellate court ultimately concluded: "Given the entirety of the instructions, the trial evidence and the arguments of counsel, it was not *reasonably likely* the jury could have believed it was required to find defendant was conscious without considering all of the evidence presented, including the expert testimony, or that defendant bore the burden of persuading the jury that he was unconscious while driving. [Citations.] Accordingly, the error occasioned by the flaw in CALCRIM No. 3425 was harmless." (*Mathson*, *supra*, 210 Cal.App.4th at p. 1331.)

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14 CALCRIM No. 3425 currently contains the following optional language: "The defense of unconsciousness may not be based on voluntary intoxication." (CALCRIM No. 3425 (2014 ed.) p. 931.)

We first note that the challenged instruction used the word "should," not "must," in the phrase "you should conclude that he was conscious." The word "should" may be "used to express obligation, duty, propriety, or desirability." (Webster's New College Dict. (4th ed. 2008) p. 1327.) It does not convey the compulsion of "must."

The instruction expressed a commonsensical inference that if one acts conscious, one is conscious. Defendant has not demonstrated that "the suggested conclusion is not one that reason and common sense justify in light of the proven facts before the jury. [Citation.]" (*Francis*, *supra*, 471 U.S. at pp. 314-315.) Further, although the language "unless" and "if, however," do not have precisely the same meaning, both the post-2013 and the pre-2013 versions of CALCRIM No. 3425 convey, when read as a whole, that the jurors cannot conclude that a defendant is conscious if they have a reasonable doubt that defendant was conscious after their consideration of all the evidence.

While we recognize that the challenged instruction did in effect require defendant to produce evidence raising a reasonable doubt if the prosecution's evidence showed that defendant acted as if he were conscious and did not raise a reasonable doubt as to consciousness, defendant's burden of production was extremely low and no different than the burden of production whenever the prosecutor presents proof beyond a reasonable doubt.[15] Thus, the instruction fits within the so-called "permissive inference" category described by the United States Supreme Court.

The challenged instruction specifically required the prosecution to meet the "beyond a reasonable doubt" standard of proof as to the fact that defendant was conscious. As in *Mathson*, *supra*, 210 Cal.App.4th 1297, the instruction "positively

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[15] As a general matter, "[t]he burden of producing evidence as to a particular fact is initially on the party with the burden of proof as to that fact." (Evid. Code, § 550, subd. (b).) "The burden of producing evidence as to a particular fact is on the party against whom a finding on that fact would be required in the absence of further evidence." (Evid. Code, § 550, subd. (a).)

reinforce[d] both the burden of proof and the fact that the prosecution bears that burden." (*Id*. at p. 1322.) It did not shift or lessen the burden of proof or persuasion or interject an unconstitutional mandatory presumption.

Insofar the instruction engendered any ambiguity, "we inquire whether there is a reasonable likelihood that the jury misunderstood and misapplied the instruction. (*Estelle v. McGuire* (1991) 502 U.S. 62, 72 & fn. 4; *People v. Avena* (1996) 13 Cal.4th 394, 417.)" (*People v. Smithey* (1999) 20 Cal.4th 936, 963.) We view the challenged instruction "in the context of the instructions as a whole and the trial record. [Citation.]" (*Estelle v. McGuire*, *supra*, at p. 72.) We also "consider the arguments of counsel in assessing the probable impact of the instruction on the jury. [Citations.]" (*People v. Young* (2005) 34 Cal.4th 1149, 1202.)

In this case, the trial court instructed the jury on the presumption of innocence, the prosecution's burden of proof, and the sufficiency of circumstantial evidence to prove intent or mental state. In closing argument, defense counsel reiterated to the jury that "the burden of proof on consciousness is on the prosecution." He told the jury: "The defense does not have to prove unconsciousness. . . . [T]he actual burden is on the prosecution to prove that Mr. Ochoa was conscious when this tragic accident happened." He stated that "[t]he People have to prove that Mr. Ochoa was conscious when this collision took place." The prosecutor argued in rebuttal that defendant "acted as if he were conscious." The prosecutor pointed to the evidence, which showed that, after striking the pedestrians, defendant drove miles, on city streets and highways, all the way from the park to Tamien Station without an accident. The prosecutor urged the jury to find him "conscious beyond a reasonable doubt."

There is no reasonable likelihood the jury misunderstood or misapplied the challenged instruction in the manner suggested by defendant. As the California Supreme Court found in *Babbitt*, *supra*, 45 Cal.3d at p. 696, "the instructions taken as a whole clearly indicate the prosecution had the burden of proving beyond a reasonable doubt not

only that defendant appeared to be conscious, but also that he in fact was conscious. [Citations.]" The challenged instruction did not violate defendant's due process rights. (See *Mathson, supra,* 210 Cal.App.4th at p. 1317.)

4. *Ineffective Assistance of Counsel*

Defendant contends that his convictions "should be reversed" because his trial counsel failed "to request that CALCRIM No. 3425 be modified to eliminate the misstatement of law and the unconstitutional presumption." Since we have found that the challenged instruction did not misstate the law or contain an unconstitutional presumption and there was no reasonable likelihood that the jury misunderstood or misapplied it, the ineffective assistance of counsel claim fails. (See *Strickland v. Washington, supra,* 466 U.S. at pp. 687-688, 693-694.)

C. *Voluntary Intoxication Instruction*

The court instructed the jury pursuant to CALCRIM No. 625: "You may consider evidence, if any, of the defendant's voluntary intoxication only in a limited way. You may consider that evidence only in deciding whether the defendant acted . . . with an intent to kill. [¶] A person is . . . voluntarily intoxicated if he or she becomes intoxicated by willingly using any intoxicating drug, liquor, or other substance, knowing that it could produce an intoxicating effect or willingly assuming the risk of that effect. [¶] You may not consider evidence of voluntary intoxication for any other purpose."

CALCRIM No. 625 implements section 29.4, subdivision (b), (formerly § 22, subd. (b) [Stats. 1995, ch. 793, § 1, p. 6149]).[16] That section provides: "Evidence of voluntary intoxication is admissible solely on the issue of whether or not the defendant actually formed a required specific intent, or, when charged with murder, whether the defendant premeditated, deliberated, or harbored express malice aforethought."

[16] Former section 22 was renumbered and amended by statute in 2012. (Stats. 2012, ch. 162, § 119, p. 2617.)

Defendant maintains that the statutory exclusion of evidence of voluntary intoxication on the issue of implied malice violates due process because the evidence is relevant and exculpatory. He maintains that the jury was "improperly precluded" from acquitting him of murder because "due to intoxication, he was unaware that his actions were dangerous to human life" and he did not act with conscious disregard for human life.

"A defendant's right to present relevant evidence is not unlimited, but rather is subject to reasonable restrictions. [Citations.] A defendant's interest in presenting such evidence may thus ' "bow to accommodate other legitimate interests in the criminal trial process." ' [Citations.] As a result, state and federal rulemakers have broad latitude under the Constitution to establish rules excluding evidence from criminal trials. Such rules do not abridge an accused's right to present a defense so long as they are not 'arbitrary' or 'disproportionate to the purposes they are designed to serve.' [Citations.] Moreover, [the United States Supreme Court has] found the exclusion of evidence to be unconstitutionally arbitrary or disproportionate only where it has infringed upon a weighty interest of the accused. [Citations.]" (*United States v. Scheffer* (1998) 523 U.S. 303, 308.)

In *Montana v. Egelhoff* (1996) 518 U.S. 37 (*Egelhoff*), the United States Supreme Court considered whether the defendant's right of due process was violated by a Montana law that "provide[d], in relevant part, that voluntary intoxication 'may not be taken into consideration in determining the existence of a mental state which is an element of [a criminal] offense.' " (*Id*. at pp. 39-40 (plur. opn. of Scalia, J.).) The plurality opinion reviewed the historic treatment of voluntary intoxication in the criminal law and concluded that a criminal defendant had no fundamental right to introduce evidence of voluntary intoxication on the issue of whether he had the requisite mental state for conviction. (*Id*. at pp. 43-51 (plur. opn. of Scalia, J.).) That opinion observed that the rule disallowing consideration of voluntary intoxication "comports with and implements

society's moral perception that one who has voluntarily impaired his own faculties should be responsible for the consequences. [Citation.]" (*Id.* at p. 50 (plur. opn. of Scalia, J.).) It concluded that nothing in the due process clause prevented the state from disallowing consideration of voluntary intoxication when a defendant's state of mind is at issue in a criminal prosecution. (*Id*. at p. 56 (plur. opn. of Scalia, J.).)

In her opinion concurring in the judgment, Justice Ginsburg determined that Montana's statutory ban on consideration of evidence of voluntary intoxication on the issue of a defendant's mental state "embodies a legislative judgment regarding the circumstances under which individuals may be held criminally responsible for their actions." (*Egelhoff*, *supra*, 518 U.S. at p. 57 (conc. opn. of Ginsburg, J.).) She stated: "When a State's power to define criminal conduct is challenged under the Due Process Clause, we inquire only whether the law 'offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.' *Patterson* [*v. New York* (1977)] 432 U.S. [197,] 202 (internal quotation marks omitted). Defining mens rea to eliminate the exculpatory value of voluntary intoxication does not offend a 'fundamental principle of justice,' given the lengthy common-law tradition, and the adherence of a significant minority of the States to that position today." (*Id*. at pp. 58-59 (conc. opn. of Ginsburg, J.).)

Defendant attempts to distinguish the Montana law considered in *Egelhoff* on the ground that the Montana law barred defense evidence of intoxication altogether while California law allows such evidence with regard to certain mental states, such as express malice, but not others. As he points out, "a finding of implied malice depends upon a determination that the defendant *actually appreciated* the risk involved, i.e., a *subjective* standard. [Citation.]" (*People v. Watson* (1981) 30 Cal.3d 290, 296-297.) He argues that under California law "voluntary intoxication is far from 'logically irrelevant' because proof that the defendant purposely or knowingly caused a death 'in a purely subjective sense' remains a required element . . . ." He maintains that intoxication is equally

relevant to both forms of malice, express and implied, and there is no logical reason to allow intoxication evidence as to express malice but not as to implied malice.[17] He asserts that "section 29.4 . . . is not a redefinition of the mental state element of implied malice, but an evidentiary rule excluding exculpatory evidence."

Defendant recognizes that California case law is against him. In *People v. Martin* (2000) 78 Cal.App.4th 1107 (*Martin*), an appellate court concluded that former section 22 as amended in 1995 did not violate due process. (*Martin, supra*, at p. 1117.) The court reasoned: "The Legislature's most recent amendment to section 22 is closely analogous to its abrogation of the defense of diminished capacity. . . . The 1995 amendment to section 22 results from a legislative determination that, for reasons of public policy, evidence of voluntary intoxication to negate culpability shall be strictly limited. We find nothing in the enactment that deprives a defendant of the ability to present a defense or relieves the People of their burden to prove every element of the crime charged beyond a reasonable doubt, including, in this case, knowledge." (*Ibid*.)

In *Timms, supra*, 151 Cal.App.4th 1292, another appellate court rejected the defendant's assertion that "*Martin* was 'poorly reasoned and wrongly decided' in light of the plurality opinion in *Montana v. Egelhoff* (1996) 518 U.S. 37 (*Egelhoff).*" (*Id*. at p. 1299.) It stated: "Assuming that Justice Ginsburg's concurrence controls, we nonetheless conclude that the application of section 22 does not violate appellant's due process rights." (*Id*. at pp. 1299-1300.) The court noted that Justice Ginsburg had stated in her concurring opinion: " 'Defining *mens rea* to eliminate the exculpatory value of voluntary intoxication does not offend a "fundamental principle of justice," given the lengthy common-law tradition, and the adherence of a significant minority of the States

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[17] Defendant does not raise an equal protection argument on appeal. In *People v. Timms* (2007) 151 Cal.App.4th 1292 (*Timms*), the court concluded that former section 22 does not violate equal protection principles because it creates different evidentiary rules with respect to express malice and implied malice. (*Timms, supra,* at p. 1302.)

to that position today. [Citations.]' (*Egelhoff*, *supra*, 518 U.S. at pp. 58-59 (conc. opn. of Ginsburg, J.).)" (*Id*. at 1300.) The *Timms* court further determined that "[u]nder this rationale, the 1995 amendment permissibly could preclude consideration of voluntary intoxication to negate implied malice and the notion of conscious disregard." (*Ibid*.) It also reasoned: "The absence of implied malice from the exceptions listed in subdivision (b) [of former section 22] is itself a policy statement that murder under an implied malice theory comes within the general rule of subdivision (a) such that voluntary intoxication can serve no defensive purpose. In other words, section 22, subdivision (b) is not 'merely an evidentiary prescription'; rather, it 'embodies a legislative judgment regarding the circumstances under which individuals may be held criminally responsible for their actions.' (*Egelhoff*, *supra*, 518 U.S. at p. 57 (conc. opn. of Ginsburg, J.).)" (*Ibid*.) It concluded that the trial court's failure to instruct that defendant's voluntary intoxication could be considered in deciding whether he acted with conscious disregard for human life did not violate his due process rights. (*Id*. at pp. 1296, 1298-1300.)

In *People v. Carlson* (2011) 200 Cal.App.4th 695 (*Carlson*), an appellate court indicated that subdivision (b) of former section 22, as amended in 1995, precluded evidence of voluntary intoxication to establish unconsciousness. (*Carlson*, *supra*, at pp. 705-707.) It observed that "[t]he Supreme Court has also recognized, in dicta, that after this amendment, 'depending on the facts, it now appears that defendant's voluntary intoxication, even to the point of actual unconsciousness, would not prevent his conviction of second degree murder on an implied malice theory . . . .' (*People v. Boyer* (2006) 38 Cal.4th 412, 469, fn. 40.)" (*Id*. at p. 706.) After considering *Egelhoff*, *supra*, 518 U.S. 37, *Martin*, *supra*, 78 Cal.App.4th 1107 and *Timms*, *supra*, 151 Cal.App.4th 1292, the appellate court determined that its interpretation of former section 22, subdivision (b), did not violate the defendant's due process rights. (*Carlson*, *supra*, at pp. 707-708.)

Defendant maintains that *Martin*, *supra*, 78 Cal.App.4th 1107, *Timms*, *supra*, 151 Cal.App.4th 1292, and *Carlson*, *supra*, 200 Cal.App.4th 695 were "wrongly decided." He argues that the amendment of former section 22 (now § 29.4) was not intended to redefine a mental-state element but rather to keep out relevant exculpatory evidence, which is an invalid purpose. Quoting from *People v. Saille* (1991) 54 Cal.3d 1103, 1116, he argues that "[t]he Legislature can 'limit the mental elements included in the statutory definition of a crime and thereby curtail use of mens rea defenses,' but it 'may not deny a defendant the opportunity to prove he did not possess that state.' " He asserts that section 29.4 violates due process because it is "a rule designed to exclude relevant, exculpatory evidence . . . ."

We are persuaded that the admission of evidence of voluntary intoxication is not a purely evidentiary issue but reflects a legislative judgment regarding criminal culpability. As the plurality opinion in *Egelhoff*, *supra*, 518 U.S. 37 recognized, the exclusion of evidence of voluntary intoxication on the issue of *mens rea* has long been understood to have strong policy justifications. (See *Id*. at pp. 44-51 (plur. opn. of Scalia, J.).) "The historical record does not leave room for the view that the common law's rejection of intoxication as an 'excuse' or 'justification' for crime would nonetheless permit the defendant to show that intoxication prevented the requisite *mens rea.*" (*Id*. at p. 45 (plur. opn. of Scalia, J.).) "Over the course of the 19th century, courts carved out an exception to the common law's traditional across-the-board condemnation of the drunken offender, allowing a jury to consider a defendant's intoxication when assessing whether he possessed the mental state needed to commit the crime charged, where the crime was one requiring a 'specific intent.' " (*Id*. at p. 46 (plur. opn. of Scalia, J.).) But the plurality and concurring opinions found no constitutional problem with entirely disallowing evidence of voluntary intoxication as had the Montana law. (*Id*. at p. 56 (plur. opn. of Scalia, J.); *id*. at p. 58 (conc. opn. of Ginsburg, J.).)

The plurality opinion in *Eglehoff* observed that the rule disallowing consideration of evidence of voluntary intoxication "comports with and implements society's moral perception that one who has voluntarily impaired his own faculties should be responsible for the consequences. [Citations.]" (*Egelhoff, supra*, 518 U.S. at p. 50, fn. omitted (plur. opn. of Scalia, J.).) "[T]he historical disallowance of intoxication evidence sheds light upon what our society has understood by a 'fair opportunity to put forward [a] defense.' That 'fundamental principle' has demonstrably not included the right to introduce [voluntary] intoxication evidence." (*Id*. at p. 51, fn. 6 (plur. opn. of Scalia, J.).)

The trial court's instruction pursuant to CALCRIM No. 625 did not violate defendant's right to due process of the law.

D. *Cumulative Impact of Alleged Errors*

Defendant argues that the combined prejudicial effect of the alleged foregoing errors denied him due process of law and a fair jury trial. We find no basis for reversal.

E. *Alleged Sentencing Error*

Defendant claims that, like the defendant in *People v. Cook* (2015) 60 Cal.4th 922 (*Cook*), he was improperly sentenced to an enhancement term under section 12022.7, subdivision (c), because subdivision (g) of section 12022.7 states "[t]his section shall not apply to murder or manslaughter." He asserts that the five-year enhancement term imposed under that section must be stricken based on the holding of *Cook*.

Cook, *supra*, 60 Cal.4th 922, involved in an automobile accident caused by defendant's speeding and reckless driving and resulted in the deaths of three persons and the serious injury of a fourth person. (*Id*. at p. 924.) "A jury found defendant guilty of three counts of gross vehicular manslaughter, one count each for the three persons who died. (§ 192, subd. (c)(1).) As to the first count, the jury also found true three allegations that defendant personally inflicted great bodily injury. Two of the great bodily injury allegations related to the two victims who died and were the subject of the other two manslaughter convictions. The third related to the person who was injured but survived."

(*Id*. at pp. 924-925.) The defendant was not charged and convicted of any crime committed against the surviving victim. (*Id*. at p. 925.)

In *Cook*, the Supreme Court framed the issue as "whether the sentence for the gross vehicular manslaughter of one victim may be enhanced for defendant's infliction of great bodily injury on *other* victims." (*Cook*, *supra*, 60 Cal.4th at p. 924.) It stated: "Subdivision (g) [of section 12022.7] means what it says—great bodily injury enhancements simply do not apply to murder or manslaughter." (*Id*. at p. 935.) The court concluded that "no great bodily injury enhancement can attach to a conviction for murder or manslaughter." (*Id*. at p. 938, fn. omitted.)

In this case, defendant was charged and convicted of assault with a deadly weapon other than a firearm or by means of force likely to produce great bodily injury upon the surviving victim (count 4) in addition to being convicted of two counts of second degree murder based on the killing of two victims (counts 1 & 2). The punishment for that aggravated assault was enhanced based upon defendant's personal infliction of great bodily injury upon the elderly victim. (See § 12022.7, subd. (c) [enhancement for personal infliction of great bodily injury on a person who is 70 years of age or older].) There was no section 12022.7 enhancement attached to either second degree murder conviction. Thus, the holding in *Cook* has no application to this case because the enhancement under section 12022.7, subdivision (c), did not impermissibly attach to a conviction of murder or manslaughter.

DISPOSITION

The judgment is affirmed.

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ELIA, J.

WE CONCUR:

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RUSHING, P. J.

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PREMO, J.